

**A PRAGMATIC STANDARD OF LEGAL VALIDITY**

A Dissertation

by

JOHN OLIVER TYLER, JR.

Submitted to the Office of Graduate Studies of  
Texas A&M University  
in partial fulfillment of the requirements for the degree of

DOCTOR OF PHILOSOPHY

May 2012

Major Subject: Philosophy

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Chair of Committee,	John J. McDermott
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## ABSTRACT

A Pragmatic Standard of Legal Validity. (May 2012)

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American jurisprudence currently applies two incompatible validity standards to determine which laws are enforceable. The *natural law* tradition evaluates validity by an uncertain standard of divine law, and its methodology relies on contradictory views of human reason. *Legal positivism*, on the other hand, relies on a methodology that commits the analytic fallacy, separates law from its application, and produces an incomplete model of law.

These incompatible standards have created a schism in American jurisprudence that impairs the delivery of justice. This dissertation therefore formulates a new standard for legal validity. This new standard rejects the uncertainties and inconsistencies inherent in natural law theory. It also rejects the narrow linguistic methodology of legal positivism.

In their stead, this dissertation adopts a pragmatic methodology that develops a standard for legal validity based on actual legal experience. This approach focuses on the operations of law and its effects upon ongoing human activities, and it evaluates legal principles by applying the experimental method to the social consequences they produce. Because legal history provides a long record of past experimentation with legal principles, legal history is an essential feature of this method.

This new validity standard contains three principles. The *principle of reason* requires legal systems to respect every subject as a rational creature with a free will. The principle of

reason also requires *procedural due process* to protect against the punishment of the innocent and the tyranny of the majority. Legal systems that respect their subjects' status as rational creatures with free wills permit their subjects to orient their own behavior. The principle of reason therefore requires *substantive due process* to ensure that laws provide dependable guideposts to individuals in orienting their behavior.

The *principle of consent* recognizes that the legitimacy of law derives from the consent of those subject to its power. Common law custom, the doctrine of *stare decisis*, and legislation sanctioned by the subjects' legitimate representatives all evidence consent.

The *principle of autonomy* establishes the authority of law. Laws must wield supremacy over political rulers, and political rulers must be subject to the same laws as other citizens. Political rulers may not arbitrarily alter the law to accord to their will.

Legal history demonstrates that, in the absence of a validity standard based on these principles, legal systems will not treat their subjects as ends in themselves. They will inevitably treat their subjects as mere means to other ends. Once laws do this, men have no rest from evil.

## **DEDICATION**

To my wife Odile and our four children,

Grace, John, Rachel, and Daniel

## **ACKNOWLEDGEMENTS**

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Finally, thanks to my parents for their sacrifices and encouragement, and to my wife Odile for her long-suffering kindness and love.

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## CHAPTER I

### INTRODUCTION: THE PRAGMATIC ORIGINS OF NATURAL LAW

#### I. The Contemporary Schism in American Jurisprudence

The American legal system resembles a planet caught between two suns. One sun is the natural law tradition of English common law. Deeply influenced by the philosophy of John Locke, this tradition is rooted in the English Revolution of the seventeenth century and elegantly expressed in Blackstone's *Commentaries on the Laws of England*. The second sun is the tradition of legal positivism. Originating in Jeremy Bentham's criticisms of Blackstone, legal positivism finds its most influential formulation in H.L.A. Hart's *The Concept of Law*.

The two suns are wholly incompatible. Since no planet can faithfully orbit opposing suns, the course of American law is now unsteady and erratic, and practitioners can no longer predict its course. Each sun has sufficient strength to pull the planet in its direction, but each has weaknesses that prevent it from overcoming the gravity of its rival.

#### A. The Deficiencies of Natural Law Jurisprudence

The strength of the natural law tradition is its pragmatism. Its great advocates have obscured its pragmatism, however, by formulating its precepts in terms of divine law and human reason. This formulation is inadequate for two reasons. First, there is no general agreement regarding the terms of divine law, and many reject its very existence. As John Austin observes, “the laws of God are not always certain.”<sup>1</sup>

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This dissertation follows the style of the *MLA Style Manual*, 7th ed. (New York: MLA, 2009).

<sup>1</sup> John Austin, *The Province of Jurisprudence Determined* (Amherst, NY: Prometheus, 2000) 186: “If the laws of God are certain, the motives which they hold out to disobey any human command which is at variance with them are Paramount to all others. But the laws of God are not always certain. All divines, at least all reasonable divines, admit that no scheme of duties perfectly complete and unambiguous was ever imparted to us by revelation.”

Second, the traditional formulation adopts inconsistent views of human reason. On one hand, human reason is acceptable to natural law theorists as a reliable guide in discerning the precepts of natural law.<sup>2</sup> On the other hand, human reason is too corrupt to generate reliable human law. This corruption requires recourse to divine law as the standard for determining the enforceability or *legal validity* of human law.<sup>3</sup>

## **B. The Deficiencies of Legal Positivism**

Legal positivism utilizes a narrow and inadequate philosophical methodology to formulate its standard of legal validity. Positivism utilizes “a purely analytical study of legal concepts, a study of the meaning of the distinctive vocabulary of the law” and describes *all* law as consisting of only two types of rules, “primary” and “secondary” rules.<sup>4</sup>

The positivist model of law as a union of rules, however, is inadequate for three reasons. First, legal positivism commits the error Dewey calls the philosophical or analytical fallacy by separating law from its historical and social contexts.<sup>5</sup> Legal positivism analyzes law based on

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<sup>2</sup> John Locke, *The Second Treatise of Government and A Letter concerning Toleration* (Mineola: Dover Publications, 2002) 3: “The state of nature has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions.”

<sup>3</sup> John Locke, *The Second Treatise of Government and A Letter concerning Toleration* (Mineola: Dover Publications, 2002) 6: “For though it would be beside my present purpose to enter here into the particulars of the law of Nature, or its measures of punishment; yet it is certain there is such a law, and that too as intelligible and plain to a rational creature and a studier of that law as the positive laws of commonwealths, nay, possibly plainer; as much as reason is easier to be understood than the fancies and intricate contrivances of men, following contrary and hidden interests put into words; for truly so are a great part of the municipal laws of countries, which are only so far right as they are founded on the law of Nature, by which they are to be regulated and interpreted.”

<sup>4</sup> H. L. A. Hart, “Positivism and the Separation of Law and Morals,” *Harv. L. Rev.* 71 (4) (1958): 593–629, 601, 601: “We must remember that the Utilitarians combined with their insistence on the separation of law and morals two other equally famous but distinct doctrines. One was the important truth that *a purely analytical study of legal concepts, a study of the meaning of the distinctive vocabulary of the law*, was as vital to our understanding of the nature of law as historical or sociological studies...” [Emphasis added].

<sup>5</sup> John Dewey, “Context and Thought,” *The Later Works of John Dewey*, ed. Jo Ann Boydston, Vol. 6 (Carbondale, IL: S. Illinois UP, 1985) 5-7. Dewey describes this error as “the habit of philosophers of neglecting the indispensability of context, both in particular and in general. I should venture to assert that the most pervasive fallacy of philosophic thinking goes back to neglect of context.” See discussion of this

its *linguistic characteristics* alone.<sup>6</sup> The positivist analysis ignores the rich and concrete historical context in which law *develops*, and it ignores the social context in which law *operates*. Legal positivism commits the philosophical fallacy by regarding its narrow linguistic analysis as a complete, final, and sufficient analysis of the nature of law.

Second, legal positivism separates law from its application.<sup>7</sup> Legal positivism determines legal validity solely by the pedigree of the law's creation. It wholly ignores content.<sup>8</sup> As a result, legal positivism recognizes the validity of “morally iniquitous laws” whose content possesses “no moral justification or force whatsoever.”<sup>9</sup> Legal positivism erroneously fails to consider the consequences of applying morally iniquitous laws.

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fallacy in Gregory F. Pappas, *John Dewey's Ethics: Democracy as Experience* (Bloomington, IN: Indiana UP, 2008) 26-7.

<sup>6</sup> Hart focuses on “a purely analytical study of legal concepts, a study of the meaning of the distinctive vocabulary of the law.” H. L. A. Hart, “Positivism and the Separation of Law and Morals,” *Harv. L. Rev.* 71 (4) (1958): 593–629.

<sup>7</sup> John Dewey, “My Philosophy of Law,” *The Great Legal Philosophers*, ed. Clarence Morris (Philadelphia: University Of Pennsylvania Press, 1959) 508. “Without application,” Dewey writes, “there are scraps of paper or voices in the air but nothing that can be called law.” Dewey continues: “Application is not something that happens after a rule or law or statute is laid down but is a necessary part of them; such a necessary part indeed that in given cases we can judge what the law is as matter of fact only by telling how it operates and what are its effects in and upon the human activities that are going on.”

<sup>8</sup> Ronald M. Dworkin, “The Model of Rules,” 35 (1) *Chi. L. Rev.* (1967): 14-46, 17. Dworkin describes the first of three tenets of Hart's positivism as follows. “The law of a community is a set of special rules used by the community directly or indirectly for the purpose of determining which behavior will be punished or coerced by the public power. These special rules can be identified and distinguished by specific criteria, by tests having to do not with their content but with their pedigree or the manner in which they were adopted or developed. These tests of pedigree can be used to distinguish valid legal rules from spurious legal rules (rules which lawyers and litigants wrongly argue are rules of law) and also from other sorts of social rules (generally lumped together as ‘moral rules’) that the community follows but does not enforce through public power.”

<sup>9</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 268: “I argue in this book that though there are many different contingent connections between law and morality there are no necessary conceptual connections between the content of law and morality; and hence morally iniquitous provisions may be valid as legal rules or principles. One aspect of this form of the separation of law from morality is that there can be legal rights and duties which have no moral justification or force whatever.”

Third, as Dworkin demonstrates, the positivist model of law as rules is incomplete. When lawyers and judges evaluate hard cases, they make use of standards that do not function as the “rules” described by legal positivism. Law thus includes *principles* as well as *rules*.<sup>10</sup>

### **C. The Problem of Legal Validity**

These differing approaches to legal validity have produced an immense schism in American jurisprudence. Legal validity is the most fundamental issue for any legal system, yet there is no uniformly recognized approach in the American legal system for determining which laws are enforceable. This schism regarding legal validity produces, in turn, a chain reaction of secondary schisms involving, *inter alia*, the selection of judges, the appropriate role of judges, the interpretation of statutes, and the interpretation of the Constitution.

The natural law tradition, for example, forbids unifying the power to make law with the power to enforce law in the same person. Judges are therefore limited to *finding* the existing law, and must never *make* new law. Legal positivism, on the other hand, accepts that judges should make new law in almost every case.

Experienced legal practitioners, wary of the fallibility of individual judges, tend to favor the natural law approach. Experienced judges, chafed by restrictions on their power, tend to favor the positivist approach. One troubling consequence of these conditions is the emergence of two opposing bodies of precedent. Another is a developing juristocracy in which unelected judges decide policy issues without public input.

### **D. A New Approach to Legal Validity**

The brightness of each sun blinds its adherents to the illumination provided by its rival.

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<sup>10</sup> Ronald Dworkin, “The Model of Rules,” *U. Chi. L. Rev.* 35 (1) (1967): 14-46, 23-24. Dworkin utilizes the case of *Riggs v. Palmer*, 115 N.Y. 506 (1889) to illustrate his distinction between *rules* and *principles*. In *Riggs*, the statutory *rule* governing the case allowed a murderer, Elmer Palmer, to inherit from his victim, his grandfather Francis Palmer. The court denied the inheritance, however, by applying the legal *principle* that no wrongdoer should benefit from his wrongdoing. This principle did not function as a primary or secondary legal rule.

Despite fifty years of debate, the opposing camps remain as unreconciled as ever. A principle or set of principles that satisfies the validity concerns of both approaches is needed. This dissertation therefore suggests a new approach to jurisprudence that rejects both the theological formulation of natural law and the analytical methodology of legal positivism. It adopts instead a pragmatic approach that develops a standard for legal validity from practical experience. This approach focuses on the operations of law and its effects upon ongoing human activities.<sup>11</sup> It evaluates legal principles by applying the experimental method to the social consequences they produce.<sup>12</sup>

Holmes writes in *The Common Law* that in order to know what law is, “we must know *what it has been*, and *what it tends to become*.” We must alternately consult legal history and legal theory.<sup>13</sup> In order to “know what law has been,” the remainder of this chapter examines the pragmatic influence of the seventeenth century English Revolution on natural law jurisprudence. Chapter II explains the major differences between natural law theory and legal positivism. It then explains the gradual displacement of natural law by legal positivism in the twentieth century.

In order to know “what law tends to become,” Chapter III examines the Athenian legal system and the case of Socrates in 399 B.C. Chapter IV examines the Congregation of the Holy Office and the Galileo Affair of 1616 to 1632, and Chapter V examines the Soviet legal system and the “Moscow Trials” of Leon Trotsky from 1936 to 1938. These legal systems demonstrate the necessity of validity constraints on both the *creation* and the *content* of law. Otherwise, law tends to operate in an unjust and arbitrary manner.

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<sup>11</sup> John Dewey, “My Philosophy of Law,” *The Great Legal Philosophers*, ed. Clarence Morris (Philadelphia: University Of Pennsylvania Press, 1959) 508.

<sup>12</sup> John Dewey, “My Philosophy of Law,” *The Great Legal Philosophers*, ed. Clarence Morris (Philadelphia: University Of Pennsylvania Press, 1959) 509-10.

<sup>13</sup> Oliver Wendell Holmes, Jr., *The Common Law* (Boston: Little Brown, 1881) 1.

The final chapter observes that although these legal systems involved a variety of legal forums and cultural settings, they shared common characteristics that produced common consequences. Consideration of these commonalities permits the identification of three general principles in whose absence legal systems tend to become arbitrary and unjust.

The first principle is the principle of *reason*. Reason addresses the concern of natural law theory for the validity of law's *content*. The principle of reason recognizes that every subject is a rational creature with a free will. To be stable, the legal system must treat its subjects as ends in themselves, and not merely as means to some other end. The legal system must also permit rational individuals to orient their own behavior in order to achieve a society based on ordered liberty. The requirements of *procedural due process* protect against the punishment of the innocent and the tyranny of the majority. The requirements of *substantive due process* enable laws to provide dependable guideposts to individuals in orienting their behavior.<sup>14</sup>

The second principle is the principle of *consent*. Consent addresses the concern of legal positivism for the validity of law's *creation*. The principle of consent provides that the legitimacy of law derives from the consent of those subject to its power. Common law custom, the doctrine of *stare decisis*, and legislation sanctioned by the subjects' legitimate representatives all evidence consent.

The third principle is the principle of *autonomy*, which addresses both the *content* and the *creation* of law. The principle of autonomy establishes the authority of law. Laws must wield superiority over political rulers. The ruler must be under the same laws as his subjects, and the laws must not be subject to arbitrary change to reflect the will of the political ruler. To

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<sup>14</sup> Lon L. Fuller, "A Reply to Professors Cohen and Dworkin," 10 (3) *Villanova Law Review* (1965): 655-66, 657.

paraphrase de Bracton, the law makes the king; the king does not make the law.<sup>15</sup> To paraphrase Aristotle, rightly constituted laws must be the final sovereign.<sup>16</sup>

Legal systems that consistently violate the principles of reason, autonomy, and consent tend to treat their subjects, not as ends in themselves, but as means to other ends. Although such legal systems manifest the power of the state, they are not valid legal systems. As demonstrated in the following chapters, these legal systems tend to become arbitrary and unjust. They also tend to destabilize the societies that suffer their injustice. The history of law in the Western tradition is very much a history of revolution.<sup>17</sup> As shown below, the natural law tradition in English jurisprudence originates in the English Revolution of 1603-1701.

## **II. The Pragmatic Origins of the Natural Law Tradition**

### **A. The English Revolution: From James I (1603) to the Act of Settlement (1701)**

A page of history is worth a volume of logic in understanding the law.<sup>18</sup> Natural law jurisprudence developed as a pragmatic response to Stuart absolutism, and Blackstone's formulation of this jurisprudence in his *Commentaries on the Laws of England* became the foundation of American jurisprudence. Legal positivism is a reaction to Blackstone's *Commentaries*. The starting point for evaluating natural law jurisprudence and legal positivism,

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<sup>15</sup> Henry de Bracton, *De Legibus et Consuetudinibus Angliae (On the Laws and Customs of England)*, ed. George E. Woodbine, trans. Samuel E. Thorne, vol. 1 (Cambridge: Harvard UP, 1968) 33: "The king must not be under man but under God and under the law, because the law makes the king ... there is no king where the will and not the law has dominion."

<sup>16</sup> Aristotle, *The Politics of Aristotle*, trans. Ernest Barker (Oxford: Oxford UP, 1946) 127: "Rightly constituted laws should be the final sovereign; and personal rule, whether it be exercised by a single person or a body of persons, should be sovereign only in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement."

<sup>17</sup> Berman, Harold J. *Law and Revolution: The Formation of the Western Legal Tradition*. Cambridge: Harvard UP, 1983; and Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformation on the Western Legal Tradition* (Cambridge: Harvard UP, 2003).

<sup>18</sup> *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.).

therefore, is the seventeenth century constitutional struggle that shaped the natural law tradition in English common law.

Fueled by arbitrary abuses of power by the Stuart kings, this struggle spanned almost a century, involved three revolutions, and witnessed seven years of civil war. At the beginning of the struggle, Stuart absolutism held that kings ruled by divine right and were only accountable to God. Kings were above the law. Kings made laws, laws did not make kings. At the end of the constitutional struggle, kings were no longer above the law, and kings no longer made the law. As the Act of Settlement of 1701 made emphatically clear, laws now made kings.

Subjects were protected by a written Bill of Rights. The philosophy of John Locke provided a philosophical justification for these “natural” rights based on the consent of the governed. Blackstone justified law on consent as well, and Blackstone's *Commentaries on the Laws of England* integrated common law, natural rights, and the lessons of history in a systematic jurisprudence.

### **B. Overview: Three Categories of Constitutional Conflict**

The struggle between the Crown and Parliament began with the accession of James I of England in 1603. It progressed through three phases before final resolution was achieved in the Act of Settlement of 1701.<sup>19</sup> The Stuarts sought to impose an absolute monarchy on England. Parliament resisted and sought to establish limits to the Crown's powers. Parliament ultimately prevailed, but the struggle was bitter, long, and bloody. In the end, an autonomous legal system

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<sup>19</sup> The first phase began with the ascension of James I on March 24, 1603. It continued until Charles I's seizure of parliament with four hundred men at arms on January 4, 1642. The second phase began with Charles I's seizure of Parliament with armed men and the resulting armed conflict. This period included the three civil wars and Cromwell's Protectorate. The second period ended with the opening of the Convention Parliament on April 24, 1660, and its invitation to Charles II to return to England and ascend the throne. The third phase began on May 8, 1660 with the declaration of Charles II as king. It included the Glorious Revolution of 1688, the coregency of William of Orange and Mary, daughter of the deposed James II, and the passage of the English Bill of Rights in 1689. Despite all the bitter struggles of the previous century, William began intermittent attempts to reassert royal supremacy. The 1701 Act of Settlement finally resolved all issues of supremacy in Parliament's favor.



emerged with clear authority over the Crown, the Parliament, and the judiciary. The powers of the state were delimited by a written Bill of Rights. John Locke was an active participant in these events, and his works reflect the principles that prevailed.

Analysis of the radical legal developments emerging from the constitutional struggle is aided by dividing the disputes between Parliament and the Stuarts into three categories, bearing in mind that these disputes were always interrelated. The first and broadest category of disputes involved the issue of Parliamentary supremacy over the Crown. This dispute played out in three contexts. The first involved the power of Parliament to control the collection of revenues. The second involved the freedom of Parliament to debate issues concerning the royal prerogative. The third involved the power of the Crown to pardon ministers impeached by Parliament.

The second major category involved the rights of the individual against the Crown. This dispute originated in the context of “liberty of conscience,” or religious liberty. As the struggle between the Crown and Parliament progressed, however, the liberties demanded against the Crown grew in number. The 1689 Bill of Rights lists thirteen specific rights delimiting the power of the Crown.

The third major category involved the autonomy and supremacy of the common law. This dispute played out in three contexts. The first was the jurisdictional contest between the common law courts and the courts of the royal prerogative. The second was the establishment of the jury as a fact finder independent from judicial control. The third was the emergence of an independent judiciary, free from interference by the Crown.

### **C. Stuart Absolutism**

James VI of Scotland became James I of England on March 24, 1603. In 1589, five years before ascending to the English throne, James stated his views on kings and parliaments in

“The Trew Law of Free Monarchies.”<sup>20</sup> His troubles with the English Parliament were immediate and profound, reflecting his view that the king was only accountable to God and thus above the law.

According to “The Trew Law,” the king possessed the sole power to make law, and the king could exercise that power without the advice or consent of Parliament “or any other estate.” Parliament, on the other hand, had no power to make “any kinde of Lawe or Statute” unless the king’s “Scepter be to it.” Only the king, therefore, could give force to a law.<sup>21</sup>

Speaking to Parliament in 1610, James stated, “The state of monarchy is the supremest thing upon earth, for kings are not only God's lieutenants upon earth and sit upon God's throne, but even by God himself they are called gods.” James concluded his speech with this ominous claim. “That as to dispute what God may do is blasphemy... so is it sedition in subjects to dispute what a king may do in the height of his power.”<sup>22</sup> Prosecuting political opponents for sedition would become a staple Stuart tactic in the troubled times ahead.

James also wrote an instruction manual in kingship in 1599 for his son entitled “Basilikon Doron,” or *Royal Gift*. James gave his son the following advice: “And therefore hold no Parliaments, but for necessitie of new Lawes, which would be but seldome: for few Lawes

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<sup>20</sup> James Stuart, “The Trew Law of Free Monarchies: or the Reciproock and Mutuall Duetie betwixt a Free King and His Naturall Subjects,” *The Political Works of James I*, ed. Charles Howard McIlwain (Cambridge: Harvard U.P., 1918) 53-71: “Kings are called Gods by the prophetical King *David*, because they sit upon GOD his Throne in the earth, and have the count of their administration to give unto him.”

<sup>21</sup> James Stuart, “The Trew Law of Free Monarchies: or the Reciproock and Mutuall Duetie betwixt a Free King and His Naturall Subjects,” *The Political Works of James I*, ed. Charles Howard McIlwain (Cambridge: Harvard U.P., 1918). “For albeit the king made daily statutes and ordinances, enjoying such paines thereto as hee thinkes meet, without any advice of Parliament or estates; yet it lies in the power of no Parliament, to make any kinde of Lawe or Statute, without his Scepter be to it, for giving it the force of a Law.”

<sup>22</sup> Marvin Perry, Joseph R. Peden and Theodore H. Von Laue, eds., *Sources of the Western Tradition, Volume II: From the Renaissance to the Present*, (Boston: Houghton Mifflin, 1995) 22-24.

and well put in execution, are best in a well ruled common-weale.”<sup>23</sup> James’ son and successor Charles I followed his father’s advice, refusing to convene Parliament during the eleven years of his “Personal Rule.” These and other actions by Charles led to three civil wars, Charles’ conviction for treason on January 27, 1649, and his beheading three days later. The refusal of James’ grandson James II to convene Parliament led to the “Glorious Revolution” of 1688 and the end of the Stuart dynasty.

#### **D. The Prelude to Civil War**

##### **1. James I and “Impositions” (1606)**

The first major conflict between Crown and Parliament involved the collection of revenues without parliamentary consent. James I relied on the royal “prerogative,” the inherent power of the Crown, to unilaterally levy “impositions” without the consent of Parliament in 1606. These “impositions” consisted of extra duties on imports and exports beyond the usual customs duties of “tunnage and poundage” granted by the first parliament of his reign.<sup>24</sup>

The levying of impositions without Parliamentary consent was challenged as invalid in *Bates’ Case*<sup>25</sup> under a series of statutes, including chapter 30 of the Magna Carta.<sup>26</sup> The king’s impositions were nevertheless upheld by the Court of Exchequer. *Bates* is the first of a series of cases in the constitutional conflict which upheld the royal prerogative in contradiction of

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<sup>23</sup> James Stuart, “Basilikon Doron: or His Maiesties Instructions to his Dearest Sonne, Henry the Prince,” *The Political Works of James I*, ed. Charles Howard McIlwain (Cambridge: Harvard U.P., 1918) 20.

<sup>24</sup> “Tunnage” was the levy assessed on each “tun” or cask of wine.

<sup>25</sup> Excerpts of the case opinion are reprinted in Carl Stephenson and Frederick George Marcham, “*Bates’ Case* (1606),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 435-37. John Bates was a merchant who refused to pay James I’s impositions on imported currants.

<sup>26</sup> Carl Stephenson and Frederick George Marcham, “Magna Carta (1215),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 120: “No sheriff or bailiff of ours, nor any other person, shall take the horses or carts of any freeman for carrying service, *except by the will of that freeman*.” [Emphasis in original].

previously established principles of law. These decisions reflect the king's power to appoint and dismiss judges at his pleasure.

The Court of Exchequer held that although the King's *ordinary* power to raise revenues was subject to the consent of Parliament,<sup>27</sup> the King nevertheless had an *absolute* power to regulate foreign trade.<sup>28</sup> The King was thus empowered to impose a duty without Parliamentary consent so long as the purpose of the duty was the regulation of foreign trade, and not simply to raise revenue. In this case, the Court of Exchequer strained reason to hold that the imposition was not being levied upon John Bates as a *subject*, but instead "as a *merchant* who imports goods."<sup>29</sup> Emboldened by this ruling, James issued a general order levying impositions without Parliament's consent.<sup>30</sup> This general order and the *Bates* decision increased the tensions between the Crown and Parliament.

## 2. Charles I and "Forced Loans" (1626)

Charles I ascended the throne in 1625. Suspicious of Charles I's religious and foreign policy, Charles' first or "Useless Parliament" refused to grant the usual lifetime taxes to the new king upon his ascension, granting them instead for only one year. Momentum began to build in

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<sup>27</sup> Carl Stephenson and Frederick George Marcham, "*Bates' Case* (1606)," *Sources of English Constitutional History* (New York: Harper & Row, 1937) 436: "Ordinary power, which exists for the purpose of civil justice, is unalterable save by consent of Parliament."

<sup>28</sup> Carl Stephenson and Frederick George Marcham, "*Bates' Case* (1606)," *Sources of English Constitutional History* (New York: Harper & Row, 1937) 437: "All customs, be they old or new, are no other but the effects and issues of trade and commerce with foreign nations. But all commerce and affairs with foreigners, all wars and peace, all acceptance and admitting for current foreign coin, all parties and treaties whatsoever, are made by the absolute power of the King; and he who hath power of causes has power also of effects."

<sup>29</sup> Carl Stephenson and Frederick George Marcham, "*Bates' Case* (1606)," *Sources of English Constitutional History* (New York: Harper & Row, 1937) 437: "But the impost here is not upon a subject; but here it is upon Bates as upon a merchant who imports goods within this land charged before by the king. And at the time when the impost was imposed upon them they were the goods of the Venetians, and not the goods of the subject nor within the land."

<sup>30</sup> Carl Stephenson and Frederick George Marcham, "James I: Levy of Impositions (1608)," *Sources of English Constitutional History* (New York: Harper & Row, 1937) 424-25.

Parliament for impeaching Charles' advisor the Duke of Buckingham,<sup>31</sup> as well as for a requirement that the king's ministers receive Parliamentary approval. Charles dissolved Parliament to prevent Parliament's acting on these initiatives.

Charles' first reaction to the "Useless Parliament" was to manipulate its membership. He appointed his opponents to official posts that prevented their sitting in the next Parliament.<sup>32</sup> His strategy failed. When the second Parliament of his reign met in 1626, the House of Commons again tried to impeach Buckingham for high treason. The Commons also threatened to delay all votes on taxation until the House of Lords delivered its verdict on Buckingham's impeachment.

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<sup>31</sup> Some in the Commons hoped they could effect a change in Charles I's policies by effecting a change in his advisors. Buckingham was also responsible for two of the most humiliating defeats in English military history, the Cadiz expedition of 1625 and the siege of Saint-Martin-de-Ré in 1627. These defeats helped motivate Parliament's continuing efforts to impeach Buckingham for treason and corruption. In the Cadiz expedition of 1625, Buckingham planned a desert crossing without supplying food or water. When the men captured the wine stores of the Spanish navy, they were permitted to drink the wine. They became drunk and began fighting amongst themselves. The English commander ordered a retreat back to the English ships. When Spanish forces arrived, they found more than one thousand drunken English soldiers remaining and killed them all. The English did not fire a single shot in their defense. Although the English initially outnumbered the Spanish four to one, they lost 62 of their 105 ships and 7,000 of the English force of 15,400 were killed or captured. The expedition did not accomplish a single objective. Spanish losses, on the other hand, were negligible. The cost of the Cadiz expedition was £250,000, equal to the revenue raised by Charles during the first year of the "forced loans" in 1625. See A.W. Ward, G.W. Prothero, and Stanley Leathes, eds., "The Constitutional Struggle in England (1625–40)," *The Cambridge Modern History*, vol. 4 (Cambridge: Cambridge UP, 1902) 262; Roger B. Manning, *An Apprenticeship in Arms: The Origins of the British Army, 1585-1702* (Oxford: Oxford UP, 2006) 114; Samuel Rawson Gardiner, *A History of England under the Duke of Buckingham and Charles I, 1624-1628*, vol. 1 (London: Longmans 1875) 302-26. In 1627, Buckingham commanded the siege against the French at Saint-Martin-de-Ré. Buckingham ordered his troops to storm the French fortress of Saint-Martin. Their ladders, however, were too short to reach the top of the walls. Despite an initial numerical superiority of five to one over the French, Buckingham lost 5,000 of his force of 7,000. See A.W. Ward, G.W. Prothero, and Stanley Leathes, eds., "The Constitutional Struggle in England (1625–40)," *The Cambridge Modern History*, vol. 4 (Cambridge: Cambridge UP, 1902) 272; Samuel Rawson Gardiner, *A History of England under the Duke of Buckingham and Charles I, 1624-1628*, vol. 2 (London: Longmans 1875) 111-66.

<sup>32</sup> A.W. Ward, G.W. Prothero, and Stanley Leathes, eds., "The Constitutional Struggle in England (1625–40)," *The Cambridge Modern History*, vol. 4 (Cambridge: Cambridge UP, 1902) 263. Charles I sought to secure a more docile body than his first Parliament by reducing the numerical strength of his opponents that were returned to the House of Commons. Potentially troublesome members were chosen to be sheriffs of their county, requiring their presence in their counties and precluding their attending Parliament. Charles also raised other opponents to aristocratic titles, making them ineligible for the Commons. Of course, this tactic gave them an automatic place in the House of Lords, where at least one of the new lords used his seat to continue his opposition to Charles' policies.

When Buckingham's impeachment appeared likely, Charles was forced to dissolve his second Parliament without gaining any subsidies.

Charles now responded to his frustrations in Parliament by imposing "forced loans" to raise revenue, and he imprisoned seventy-six prominent subjects who refused to give them. Fearful that the magistrates might rule against him, however, Charles did not file charges against his prisoners. The prisoners were also denied bail.

### **3. Charles I and the *Case of the Five Knights* (November 15-28, 1627)**

The *Case of the Five Knights* <sup>33</sup> involved a habeas corpus proceeding in 1627 by five such prisoners challenging the King's right to imprison subjects for refusing to make forced loans. They also challenged the right of the King to hold prisoners without charges and without bail. The Court of the King's Bench observed that the prisoners "are detained in prison by special command of the king." Since the King had stated no cause for the arrests, the Court presumed that the arrests were "a matter of state [meaning the royal prerogative], which we cannot take notice of." As a court of common law jurisdiction, it had no jurisdiction to review any exercise of the royal prerogative. "We are sworn to maintain all prerogatives of the king; that is one branch of our oath."

The Court of the King's Bench therefore denied the writ of habeas corpus. Charles' judges in the *Case of the Five Knights* thus permitted the imprisonment of English subjects by the King without charges, without bail, and without trials. The purpose of the imprisonment was to force the "loans" of private property, against the owners' will, and all without the consent of Parliament. All these acts violated previously established law. <sup>34</sup>

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<sup>33</sup> Carl Stephenson and Frederick George Marcham, "*The Case of the Five Knights* (1627)," *Sources of English Constitutional History* (New York: Harper & Row, 1937) 457-58. The case was tried during November 15-28, 1627.

<sup>34</sup> Carl Stephenson and Frederick George Marcham, "Magna Carta (1215)," *Sources of English Constitutional History* (New York: Harper & Row, 1937) 115-26. The principle of taxation by consent is

Charles' third Parliament convened ten weeks later on March 17, 1628. In reaction to the *Case of the Five Knights*, Parliament began its deliberations by criticizing the King's infringements of "The Subject's Liberty in His Person." On May 6, 1628, the House of Commons voted to draft a petition stating their grievances to the King. The House proceeded by way of petition of right rather than by bill as the most politic means of obtaining a redress of grievances without overtly threatening the royal prerogative. This decision would prove to be a significant miscalculation.

On May 27, 1628, Parliament unanimously adopted the "Petition of Right"<sup>35</sup> condemning eight measures taken by Charles and the Privy Council to compel subscription to the forced loans.<sup>36</sup> Desperate for funds, and faced with a unanimous Parliament arrayed against him, Charles putatively accepted the Petition of Right on June 7 by stating, "Soit droit fait come est désiré," ("*Let right be done as is desired*"). Parliament then voted Charles the subsidies he needed. Since the Petition of Right was only a petition and not a bill, however, Charles would later claim that his assent to the Petition of Right placed no limits on the royal prerogative.

Three weeks later, Charles was again forced to prorogue his third Parliament to prevent the impeachment of the Duke of Buckingham. In proroguing Parliament on June 26, Charles reasserted the full power of the royal prerogative despite the Petition of Right. "I owe an account

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contained in chapters 12 through 15 of the Magna Carta, and had recently been upheld against James I in *Bates' Case* in 1606. Chapter 39 of the Magna Carta forbids the imprisonment of any freeman "except by the lawful judgment of his peers or by the law of the land." Chapter 40 prohibits the king from denying or delaying "right or justice" to any one.

<sup>35</sup> Carl Stephenson and Frederick George Marcham, "Petition of Right (1628)," *Sources of English Constitutional History* (New York: Harper & Row, 1937) 450-52.

<sup>36</sup> These measures included: (1) imprisonment without lawful cause, (2) denial of habeas corpus, (3) denial of bail, (4) taxation not authorized by Parliament, (5) billeting of soldiers in private houses, and (6) summary trials under martial law. Carl Stephenson and Frederick George Marcham, "Petition of Right (1628)," *Sources of English Constitutional History* (New York: Harper & Row, 1937) 450-52. These rights were claimed under laws and statutes dating from the *Magna Carta* in 1215 and the laws of Edward I, Edward III, and Richard III.

of my actions to none but to God alone,” he said, admonishing Parliament that “none of the house of commons, joint or separate, what new doctrine soever may be raised, have any power either to make or declare a law without my consent.”<sup>37</sup>

Charles intended to recall Parliament the following year. The Duke of Buckingham was assassinated in the interim by former army officer John Felton.<sup>38</sup> Charles hoped that the second session of the third Parliament would be more productive without the polarizing figure of Buckingham, but these hopes were soon dashed. When Parliament reconvened on January 23, 1629, Puritans in the House of Commons were concerned with the growing influence of the Arminian faction in the Church of England, and they complained about the continuing collection of tunnage and poundage without Parliamentary consent.

Furthermore, John Rolle, a Member of Parliament who refused to pay the tunnage and poundage levy, had been arrested and his goods seized. Rolle was imprisoned and questioned before the infamous Court of the Star Chamber. Since Parliament was debating the legitimacy of seizing merchants’ goods at the time, Rolle’s treatment was viewed by the Commons as a provocative breach of Parliamentary privilege.

On March 2, 1629, the King’s opponents in Commons issued a protestation known as the “Three Resolutions.”<sup>39</sup> First, any person seeking to extend or introduce popery, Arminianism, or other “innovation of religion” was declared a capital enemy of the kingdom and commonwealth. Second, any person counseling or advising the levying of tunnage and poundage without Parliament’s approval was declared a capital enemy of the kingdom and commonwealth.

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<sup>37</sup> Carl Stephenson and Frederick George Marcham, “Proceedings on the Petition of Right (1628),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 450-52.

<sup>38</sup> Samuel Rawson Gardiner, *A History of England under the Duke of Buckingham and Charles I, 1624-1628*, vol. 2 (London: Longmans 1875) 325-48. Felton became widely popular throughout England for this act.

<sup>39</sup> Carl Stephenson and Frederick George Marcham, “Resolutions of the Commons (1629),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 454-55.



Third, any merchant paying such tunnage and poundage was declared “a betrayer of the liberties of England, and an enemy to the same.”

#### **4. Charles I and the “Eleven Years’ Tyranny” (1629-1640)**

An angry Charles ordered Parliament dissolved. When the Speaker of the House of Commons rose to announce that Parliament was adjourned on order of the King, two members of the House, Denzil Holles and Benjamin Valentine, pushed him down and held him in his seat. Sir John Eliot read the three resolutions while guards sent by the King pounded on the locked doors of the chamber. The House of Commons passed the resolutions and then voted its own adjournment.

On March 10, 1629, Charles denounced his enemies in Parliament in a royal proclamation and asserted the Crown’s right to collect tunnage and poundage without Parliamentary consent. The next day, Charles arrested nine members of the House of Commons and charged them with sedition and libel. Sir John Eliot, Denzil Holles, and William Strode were imprisoned. Eliot died in prison two years later, and Holles and Strode remained in prison until 1640.

Charles viewed himself as the sun of the constitutional system. Parliament was merely one of the planets orbiting his throne. Charles now resolved to rule England without Parliament and govern instead through two men. Charles’ fiscal policy was determined by his treasurer, Sir Richard Weston. Charles’ religious policy was determined by the Bishop of London, Sir William Laud, whom Charles elevated to Archbishop of Canterbury in 1633. Both men's policies produced disaster. The eleven years of Charles’ “personal rule” that followed became popularly known as the “Eleven Years’ Tyranny.”

Regarding matters of fiscal policy, Treasurer Weston scoured the law to revive obsolete means of raising funds that did not require Parliamentary consent. On July 13, 1630, Weston

resurrected a long abandoned thirteenth century custom known as the “distrain of knighthood.”<sup>40</sup>

This custom required freeholders with land worth more than £40 per year to present themselves for knighthood at the King's coronation. Fines were levied in 1630 on freeholders that had not attended Charles I's coronation on February 2, 1625. The freeholders were forced to buy their knighthoods, and their elevation to knighthood then subjected them to increased taxes on their lands.

In 1635, the King declared that the true limits of the Royal forests were those that had been in force during the reign of King Edward I from 1272 to 1307. These borders had long been disregarded. Persons residing within these boundaries were now fined, however, for encroaching on the King's land.<sup>41</sup>

### **5. Charles I and “Ship Money” (October 20, 1634)**

These measures were understandably unpopular, but they were nevertheless within the royal prerogative and thus did not require Parliamentary consent.<sup>42</sup> The most unpopular of Charles' measures, however, was the collection of ship money, which was less clearly within the king's prerogative.<sup>43</sup> Ship money was a tax traditionally levied against coastal counties for naval

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<sup>40</sup> Carl Stephenson and Frederick George Marcham, “Proclamation for Distrain of Knighthood (1630),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 455. A “distrain” is a seizure of property in order to obtain payment for a debt.

<sup>41</sup> Carl Stephenson and Frederick George Marcham, “Commission for Levying Fines under Forest Law (1635),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 456-57.

<sup>42</sup> A “forest” was an area designated by royal prerogative to be governed by the Forest Courts applying forest law, a separate body of law from common law. Forests were reserved to the royal pleasure, and forest law protected the “venison,” or animals of the chase, the “vert,” or “greenwards” supporting the animals of the chase, and the “covert” that provided them shelter. The common law additionally prohibited the occupation of certain classes of natural resources by private subjects because they belonged to the Crown by virtue of the royal prerogative. These resources included gold and silver ore, swans, venison in a rural forest, and certain “great fish,” including whales, sturgeon, porpoises, and dolphins. These natural “flowers of the Crown” could only be acquired by subjects through royal grant or prescription. See J.H. Baker, *An Introduction to English Legal History*, 3rd ed. (London: Butterworth, 1990) 430; Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 335-340.

<sup>43</sup> Carl Stephenson and Frederick George Marcham, “Writ for the Collection of Ship Money (1634),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 455-56.

expenses incurred for their protection during time of war. On October 20, 1634, Charles expanded his levy of ship money to *inland* counties during a time of *peace*. This levy was unprecedented in English history, and it was widely perceived as the levying of a new tax without the consent of Parliament.

To preserve a pretense of legality, Charles obtained an advisory judicial opinion in “*The Question of Ship Money*”<sup>44</sup> from the twelve justices of the combined Court of the King’s Bench, the Court of Common Pleas, and the Court of the Exchequer. The twelve judges rendered the unanimous opinion that the royal prerogative permitted the king to command and compel *all* his subjects to pay ship money in times of danger. The opinion further held that the king is the *sole* judge both of the danger and of the expenses required to protect against it.

A concerted campaign of non-payment of ship money was led by Viscount Saye and Sele. In *Hampden's Case*, the Viscounts’ associate John Hampden was ordered to show cause before the Court of the Exchequer for failing to pay the levy of ship money on his lands in Buckinghamshire. Hampden claimed the levy was illegal because it issued without Parliament’s consent. After twelve days of argument by counsel, the twelve justices of the combined Court of the King’s Bench, the Court of Common Pleas, and the Court of the Exchequer rendered judgment for the King by a vote of seven to five.<sup>45</sup> Foreshadowing the travails into which the nation would soon descend, five of the judges reversed their position from the advisory opinion

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<sup>44</sup> Carl Stephenson and Frederick George Marcham, “The Question of Ship Money (1637),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 455-56. This advisory opinion was issued on February 7, 1637. The twelve judges consisted of John Bramston, John Finch, Humphrey Davenport, John Denham, Richard Hutton, William Jones, George Croke, Thomas Trevor, George Vernon, Francis Crawley, Robert Berkeley, and Richard Weston. Because of the dramatic consequences flowing from the issuance of this opinion. American federal courts categorically refuse to issue advisory opinions or to decide “political questions,” holding that advisory opinions are outside their limited jurisdiction.

<sup>45</sup> Carl Stephenson and Frederick George Marcham, “*The King v. John Hampden* (1638),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 459-62.

they had rendered just one year earlier in “*The Question of Ship Money*.”<sup>46</sup> Hampden’s Case would soon prove a Pyrrhic victory for Charles and the judges of the majority.

## 6. Charles I and Religious Repression

Regarding matters of religious policy, Archbishop William Laud introduced theological doctrines and liturgical practices identified with Roman Catholicism that had been repudiated by Anglicanism. Laud brutally and systematically repressed all who publicly opposed these changes. Clergy and laity were disciplined by the Court of the High Commission.<sup>47</sup> Some were subjected to cruel and severe penalties by the Court of the Star Chamber.<sup>48</sup> In one such case, the

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<sup>46</sup> These judges were George Croke, Richard Hutton, Humphrey Davenport, John Denham, and John Bramston. Carl Stephenson and Frederick George Marcham, “*The King v. John Hampden* (1638),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 459 n. 5.

<sup>47</sup> The Court of the High Commission was a prerogative court with jurisdiction in ecclesiastical matters. It had original jurisdiction over immorality and violations of ecclesiastical laws by the clergy as well as jurisdiction over heresy, schism, and nonconformity committed by either the clergy or laity. These offenses were defined very broadly. Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge: Harvard UP, 2003) 312. “The quarreling of two old women in church was schism, witchcraft was heresy, and the failure of the parson to read prayers on Wednesday because he was reaping his harvest was nonconformity.” Sir William Searle Holdsworth, *A History of English Law*, vol.1, (Boston: Little Brown, 1926) 608.

<sup>48</sup> The Court of the Star Chamber referred to meetings of the King’s Privy Council in judicial session and took its name from the starred roof of the chamber in which it sat in judicial session. The Privy Council was the chief executive arm of the King, with ultimate control of the entire system of courts. It was itself a judicial body. When the Privy Council set as the High Court of the Star Chamber, the chief justices of the King’s Bench and Common Pleas also participated, even though they were not members of the Privy Council. The Chancellor usually presided over judicial sessions, which heard both criminal and civil cases. Except in rare cases when the king chose to personally intervene, the Court of the Star Chamber could not impose the death sentence and could not determine rights in freehold land. These were reserved to the jurisdiction of the common law courts. Therefore the Court of the Star Chamber normally had no jurisdiction over felonies and treason, since these involved capital punishment and escheat of land. Instead, the Court of the Star Chamber normally imposed punishments such as fines, imprisonment up to life, loss of ears, nose, or tongue, whipping, the pillory, public confessions, and wearing a paper specifying the offense. In contrast, common law court punishments were limited in felony cases to sentences of death by hanging, mutilation of eyes or legs, escheat of land, forfeiture of chattels, and outlawry. In cases of lesser crimes, common law courts could issue small fines and imprisonment up to one year. Proceedings before the Court of the Star Chamber were adapted from canon law and often resembled proceedings before the Inquisition, including such features as secret sessions and the use of torture to extract confessions. Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge: Harvard UP, 2003) 309-11; A.W. Ward, G.W. Prothero, and Stanley Leathes, eds., “The Constitutional Struggle in England (1625–40),” *The Cambridge Modern History*, vol. 4 (Cambridge: Cambridge UP, 1902) 278-280. Under the Tudor and Stuart dynasties, the Court of the Star Chamber was used for the persecution of political and religious dissidents and known for its cruel and

Puritan lawyer William Prynne authored a pamphlet entitled *Historiomatrix* criticizing the theater on religious grounds. For his “crime,” Prynne was sentenced to life imprisonment, a fine of £5,000, and expulsion from his profession. On June 30, 1637, Prynne was publicly pilloried, his nostrils were slit, his ears were cut off, and his cheeks were branded “S & L” for sedition and libel.<sup>49</sup> To escape such religious oppression, more than 20,000 English subjects emigrated from England to the Massachusetts Bay Colony. An equal or greater number went to the Netherlands.<sup>50</sup>

In 1637, Charles and Archbishop Laud sought to control Calvinism and Presbyterianism in Scotland by forcing Scotland to accept an Anglican style prayer book. Scotland responded by entering a “National Covenant,” rejecting the prayer book and abolishing the Scottish episcopacy. Charles invaded Scotland in 1639 and again in 1640 to enforce compliance with the new prayer book.

The Scots defeated both invasions in what became known as the “Bishop’s Wars.” In the second war, the Scots counter-invaded and occupied parts of northern England. Under the Treaty of Ripon, Charles bore the humiliation of agreeing to pay the Scots £850 per day to maintain their forces in northern England in order to obtain a truce.<sup>51</sup>

## **7. The “Long Parliament” (November 3, 1640)**

The financial demands of the Bishop’s Wars and the Treaty of Ripon forced Charles to recall Parliament, and the “Long Parliament” assembled on November 3, 1640. Provoked by

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unusual punishments. In American jurisprudence, the Court of the Star Chamber symbolizes legalized tyranny and cruelty without due process protections.

<sup>49</sup> Samuel Rawson Gardiner, ed., *Documents Relating to the Proceedings against William Prynne in 1634 and 1637* (Westminster: Nichols, 1877) 75-76.

<sup>50</sup> The great majority of émigrés were not Separatists, but Episcopalians who disagreed with Laud’s religious “innovations.” It was thus said of Laud that “what he grasped with one hand he destroyed with the other.”

<sup>51</sup> A.W. Ward, G.W. Prothero, and Stanley Leathes, eds., “The Constitutional Struggle in England (1625–40),” *The Cambridge Modern History*, vol. 4 (Cambridge: Cambridge UP, 1902) 284-85.

eleven years of Charles' "personal rule" and chafing from Charles' perceived bad faith in assenting to Parliament's Petition of Right in 1628, the Long Parliament took a bold series of steps to curtail the royal prerogative and assert Parliamentary supremacy. It abolished the Court of the Star Chamber<sup>52</sup> and the Court of the High Commission,<sup>53</sup> the instruments of Charles' political and religious oppressions. Parliament demanded the release and compensation of all persons imprisoned by both courts. It impeached and imprisoned Archbishop Laud,<sup>54</sup> the architect of Charles' religious policies and "innovations," and issued a Bill of Attainder against the Earl of Stafford,<sup>55</sup> Charles' principal domestic advisor and architect of Charles' policies of repression. A crowd of 200,000 gathered at Tower Hill for the execution of Strafford on May 12, 1641.<sup>56</sup> Laud was executed on January 10, 1644.

Parliament next made itself a permanent institution of government and took firm control of all sources of revenue. No more than three years could pass without a Parliament being called.<sup>57</sup> Parliament could not be dissolved without its own consent.<sup>58</sup> Ship money was abolished.<sup>59</sup> Levying tunnage and poundage without Parliamentary consent was forbidden, and

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<sup>52</sup> Carl Stephenson and Frederick George Marcham, "Act Abolishing Arbitrary Courts (1641)," *Sources of English Constitutional History* (New York: Harper & Row, 1937) 479-80.

<sup>53</sup> Carl Stephenson and Frederick George Marcham, "Act Abolishing the Court of the High Commission (1641)," *Sources of English Constitutional History* (New York: Harper & Row, 1937) 479-80.

<sup>54</sup> Samuel Rawson Gardiner, ed., "The Grand Remonstrance with the Petition Accompanying It," *The Constitutional Documents of the Puritan Revolution 1625-1660* (Oxford, Oxford U.P., 1906) 202-231.

<sup>55</sup> Carl Stephenson and Frederick George Marcham, "Act for the Attainder of Strafford (1641)," *Sources of English Constitutional History* (New York: Harper & Row, 1937) 477-78. Bills of Attainder were a device used by Parliament to secure the deaths of political opponents solely by the will of Parliament. The U.S. Constitution prohibits Bills of Attainder in Article I, section 9.

<sup>56</sup> Samuel R. Gardiner, *A History of England, 1603-1642*, vol. 9 (London: Spottiswoode, 1884) 369.

<sup>57</sup> Carl Stephenson and Frederick George Marcham, "Triennial Act (1641)," *Sources of English Constitutional History* (New York: Harper & Row, 1937) 476-77.

<sup>58</sup> Carl Stephenson and Frederick George Marcham, "Act to Continue the Existing Parliament (1641)," *Sources of English Constitutional History* (New York: Harper & Row, 1937) 477.

<sup>59</sup> Carl Stephenson and Frederick George Marcham, "Act Abolishing Ship Money (1641)," *Sources of English Constitutional History* (New York: Harper & Row, 1937) 477.

Parliamentary grants were limited to only two months, rather than the king's lifetime.<sup>60</sup> The boundaries of royal forests were restored to the boundaries recognized during the reign of James I.<sup>61</sup> Parliament abolished fines for distraint of knighthood.<sup>62</sup>

Parliament also rejected the religious policies of the Crown. Bishops and all members of holy orders were forbidden from holding secular offices.<sup>63</sup> The Grand Remonstrance demanded reparations for 204 listed grievances occasioned by the influence of "Jesuited Papists," the "Bishops" and "corrupt part of the Clergy" (meaning Archbishop Laud), and "Councillors and Courtiers" (meaning the Earl of Strafford).<sup>64</sup>

### **8. Charles I and the Attempted Arrests in the House of Commons (January 4, 1642)**

On January 3, 1642, Charles sent his sergeant-at-arms to arrest five leaders in the House of Commons for treason. Charles claimed the five members had conspired with the Scots to

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<sup>60</sup> Carl Stephenson and Frederick George Marcham, "Tunnage and Poundage Act (1641)," *Sources of English Constitutional History* (New York: Harper & Row, 1937) 478-79.

<sup>61</sup> Carl Stephenson and Frederick George Marcham, "Act Defining Forests and Forest Law (1641)," *Sources of English Constitutional History* (New York: Harper & Row, 1937) 482-83.

<sup>62</sup> Carl Stephenson and Frederick George Marcham, "Act Abolishing Fines for Distraint of Knighthood (1641)," *Sources of English Constitutional History* (New York: Harper & Row, 1937) 483.

<sup>63</sup> Carl Stephenson and Frederick George Marcham, "Act Abolishing Temporal Power of the Clergy (1641)," *Sources of English Constitutional History* (New York: Harper & Row, 1937) 486.

<sup>64</sup> Samuel Rawson Gardiner, ed., "The Grand Remonstrance with the Petition Accompanying It," *The Constitutional Documents of the Puritan Revolution 1625-1660* (Oxford, Oxford U.P., 1906) 202-231: "The root of all this mischief we find to be a malignant and pernicious design of subverting the fundamental laws and principles of government, upon which the religion and justice of this kingdom are firmly established. The actors and promoters hereof have been: 1. The Jesuited Papists, who hate the laws, as the obstacles of that change and subversion of religion which they so much long for. 2. The Bishops, and the corrupt part of the Clergy, who cherish formality and superstition as the natural effects and more probable supports of their own ecclesiastical tyranny and usurpation. 3. Such Councillors and Courtiers as for private ends have engaged themselves to further the interests of some foreign princes or states to the prejudice of His Majesty and the State at home."

support the establishment of Presbyterianism in Scotland.<sup>65</sup> The House of Commons invoked parliamentary privilege and refused to permit the arrests.

Charles then determined to end his sea of Parliamentary troubles by taking arms against them. On January 4, Charles came to the House of Commons accompanied by 400 men at arms to make the arrests himself and accomplish a coup d'état of Parliament. Taking the speaker's chair, Charles justified his invasion of parliamentary privilege by claiming the traitors he sought retained no privileges. Charles then asked Speaker William Lenthall to tell him where the five members were. The Speaker replied, "May it please your Majesty, I have neither eyes to see nor tongue to speak in this place but as the House is pleased to direct me, whose servant I am here." "Well," Charles replied, "since I see all the birds have flown, I do expect from you that you shall send them in to me as soon as they return hither." <sup>66</sup>

Civil war was now inevitable. Parliament quickly took control of London and the militia.<sup>67</sup> Charles fled London with his family on January 10 to raise an army in the north.

## **E. The Civil War (1642-1651)**

### **1. Charles I and the Scottish "Engagement" (December 26, 1647)**

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<sup>65</sup> The five targeted members were John Pym, John Hampden, Denzel Hollis, William Strode, and Sir Arthur Haselrig. Arthur D. Innes, *A History of England and the British Empire*, vol. 2 (New York: McMillan, 1913) 344-45.

<sup>66</sup> Francois Guizot, *History of the English Revolution of 1640*, trans. William Hazlitt (London: Bogue, 1846) 132-33. Charles continued: "But I assure you, on the word of the King, I never did intend any force, I shall proceed against him in a legal and fair way; for I never meant any other: and now, since I see I cannot do what I came for, I will trouble you no more, but tell you, I do expect, as soon as they come to the house, you will send them to me, otherwise I must take my own course to find them."

<sup>67</sup> Carl Stephenson and Frederick George Marcham, "The Militia Ordinance (1642)," *Sources of English Constitutional History* (New York: Harper & Row, 1937) 486. The King refused to sign this enactment in the form of a bill. It was then revised into an ordinance of Parliament. *Ibid*, 486 n. 10. This ordinance took the unprecedented step of proclaiming that Parliament could act independently of the King in the interests of the nation's defence. Charles I countered by issuing the Commissions of Array to counter the Militia Ordinance. The early test of loyalty during the civil war became whether one rendered obedience to Parliament's Ordinance or to the King's Commission.



Resolving the great issues of supremacy under the English constitution was no longer a matter for Parliamentary bills or court cases, and England endured three periods of civil war from 1642 until 1651. The first phase, fought between Royalists and Parliament from 1642-1646, ended in victory for the parliamentary forces under Cromwell with Charles I as their prisoner. Negotiations ensued for restoring Charles to the throne. Charles bartered with Parliament in bad faith, simultaneously negotiating a secret agreement with the Scots known as “the Engagement.” Charles signed the Engagement on December 26, 1647, and promised in the Engagement to establish Presbyterianism in both England and Scotland for three years if Scotland would invade England and restore Charles to the throne.<sup>68</sup>

The resulting Scots invasion and Royalist uprisings comprised the second phase of the civil war, from 1648 to 1649. Parliamentary forces under Cromwell’s command prevailed again. The discovery of Charles’ secret “Engagement” with the Scots convinced many Parliamentarians that Charles could never be trusted. Cromwell, who had supported negotiations with Charles for his restoration, wrote that Charles’ “Engagement” was “a more prodigious treason than any that had been perfected before; because the former quarrel was that Englishmen might rule over one another; this to vassalise us to a foreign nation.”<sup>69</sup>

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<sup>68</sup> Samuel Rawson Gardiner, *A History of the Great Civil War, 1642-1649*, vol. 3 (London: Longman’s, 1891) 272-76. After the initial three year period, the form of Church government would be jointly determined by Charles I and Parliament after it was debated by a committee composed of members from England and Scotland as follows: “a free debate and consultation be had with the Divines at Westminster, twenty of His Majesty’s nomination being added unto them, and with such as shall be sent from the Church of Scotland, whereby it may be determined by His Majesty and the two Houses how the Church government, after the said three years, shall be fully established as is most agreeable to the Word of God.”

<sup>69</sup> Samuel Rawson Gardiner, *Oliver Cromwell* (London: Goupil, 1899) 100.

## 2. Parliament Abolishes the Monarchy and the House of Lords (March 17 and 19, 1649)

A “High Court of Justice” was established on January 4, 1629, to try Charles for treason.<sup>70</sup> Although the House of Lords refused to accept the High Court of Justice, the High Court convicted Charles of treason on January 27,<sup>71</sup> and Charles was executed three days later. Charles’ final words reiterated his faith in Stuart absolutism. English subjects had no rightful “share” in their own government.<sup>72</sup> Charles I then laid his head upon the block, signaled the executioner, and “the kingly head, with its crown of sorrows, dropped upon the scaffold.”<sup>73</sup>

Parliament abolished the monarchy<sup>74</sup> on March 17, 1649 and the House of Lords on March 19, 1649.<sup>75</sup> England was declared a Commonwealth, and the House of Commons was declared the supreme authority of the land.<sup>76</sup>

The third and final phase of the civil war began with Cromwell’s suppression of Royalists and their Confederates in Ireland in 1649. The dead king’s son, the future Charles II, landed in Scotland in 1650 and formed an alliance with the Scots. Charles made a futile attempt

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<sup>70</sup> Carl Stephenson and Frederick George Marcham, “Act Erecting a High Court of Justice (6 January),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 516.

<sup>71</sup> Carl Stephenson and Frederick George Marcham, “The Sentence of the Court (27 January),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 516.

<sup>72</sup> Samuel Rawson Gardiner, *A History of the Great Civil War, 1642-1649*, vol. 3 (London: Longman’s, 1891) 596: “For the people, truly I desire their liberty and freedom as much is anybody whatsoever; but I must tell you that their liberty and freedom consists in having government, those laws by which their lives and their goods may be most their own. ***It is not their having a share in the government; that is nothing appertaining unto them.*** A subject and a sovereign are clean different things; and, therefore, until you do that-I mean that you put the people in that liberty-they will never enjoy themselves.” [Emphasis added].

<sup>73</sup> Samuel Rawson Gardiner, *A History of the Great Civil War, 1642-1649*, vol. 3 (London: Longman’s, 1891) 597.

<sup>74</sup> Carl Stephenson and Frederick George Marcham, “Act Abolishing the Kingship (1649),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 521-22.

<sup>75</sup> Carl Stephenson and Frederick George Marcham, “Act Abolishing the House of Lords (1649),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 522.

<sup>76</sup> Carl Stephenson and Frederick George Marcham, “Act Establishing the Commonwealth (1649)” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 523-24.

to invade England, but his army was crushed by Cromwell at the Battle of Worcester on September 3, 1651. Charles escaped and reached France after six weeks of narrow escapes.<sup>77</sup>

### **3. Cromwell becomes Lord Protector (1653-1658)**

Cromwell's victory at Worcester marked the end of the civil war, but it did not mark the end of England's troubles. With the kingship abolished and the civil war ended, the great common causes that united the Parliamentarians were gone. Political factions within Parliament began to fight among themselves. When Cromwell returned from his campaigns in Ireland and Scotland, he attempted to prod the "Rump Parliament" into setting new elections and establishing a single government for England, Ireland, and Scotland that recognized liberty of religious conscience. On April 20, 1653, after two years of Parliamentary inaction, Cromwell cleared the chamber with the assistance of forty musketeers and dissolved the Rump Parliament by force.<sup>78</sup>

Cromwell's actions were as incompatible with the great principle of Parliamentary supremacy as Charles I's failed coup d'état had been. Cromwell, however, was no Charles, and there was no force in England sufficient to resist his will. Another Parliament, the "Barebones Parliament,"<sup>79</sup> convened on July 4, 1653, its 140 members selected by Cromwell's officers. It also proved ineffectual and dissolved itself on December 12, 1653. The "Instrument of Government" was then adopted, appointing Cromwell as Lord Protector for life. The

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<sup>77</sup> Antonia Fraser, *King Charles II* (London: Weidenfeld and Nicolson, 1979), 96-128.

<sup>78</sup> Charles Henry Parry, *The Parliament and Councils of England, From the Reign of William I to the Revolution in 1688* (London: Murray, 1889). Cromwell stated: "You are no longer a Parliament. I tell you, you are no longer a Parliament. The Lord has done with you. He has chosen other Instruments for carrying on his Work... it is you who have forced me upon this. I have sought the Lord, night and day, that he would rather slay me than put me upon this work. (Commanding the Soldiers to clear the Hall, he goes out last himself, and ordering the Doors to be locked, departs the House)." *Id.* at 510.

<sup>79</sup> The name derives from the name of one of its members, Praise-God Barebones. Robert Southey, *Life of Cromwell* (New York: Appleton, 1845) 138.

“Instrument,” the first written constitution of England, granted Cromwell the executive powers of government. The “Instrument” granted *de jure* legislative powers to Parliament.<sup>80</sup>

Cromwell was offered the crown in 1657 but declined, stating, “I would not seek to set up that which Providence hath destroyed and laid in the dust, and I would not build Jericho again.”<sup>81</sup> Nevertheless, despite all the upheavals and struggles of the great civil war, Parliament still did not function as the supreme body of government. It remained the *de facto* creature of Cromwell’s will.<sup>82</sup> Although Cromwell succeeded in obtaining a significant degree of liberty of conscience,<sup>83</sup> he failed to resolve the other root issue that precipitated civil war, the conflict between the Crown and Parliament for constitutional supremacy. Under Cromwell, the conflict between Parliament and Crown was merely transformed into a conflict between Parliament and the Lord Protector.

## **F. The Stuart Restoration (1660-1688)**

### **1. Charles II and the Declaration of Breda (April 4, 1660)**

Cromwell died on September 3, 1658. A new “Convention Parliament,” dominated by Royalists, convened on April 25, 1660. In an effort to regain the throne, Charles II issued his

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<sup>80</sup> Carl Stephenson and Frederick George Marcham, “The Instrument of Government (1653),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 525-29. The Instrument of Government became England’s first written constitution.

<sup>81</sup> The reference is to Joshua’s curse in Joshua 6:26 upon any man who rebuilt Jericho that the rebuilding would result in the death of the eldest and youngest sons. The curse was fulfilled on Hiel the Bethelite, who rebuilt Jericho, by the loss of his eldest and youngest sons. I Kings 16:34.

<sup>82</sup> Paragraph 6 of the Instrument of Government, for example, provides that no laws or taxes could be made, altered, or repealed without the consent of parliament. Paragraph 6 is expressly subject to paragraph 30, however, that permits the Lord Protector to raise money, with the consent of his executive council, in times of “disorders and dangers,” and to conduct foreign policy. Parliament had the power, however, to review these actions.

<sup>83</sup> Cromwell established a broad toleration of Protestant denominations, Jews, and Quakers. Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge: Harvard UP, 2003) 221. The Jews had been expelled by Edward I’s Edict of Expulsion in 1290. Cromwell’s Protectorate Parliament invited the Jews to return to England in 1655. Roman Catholics, however, continued to suffer discrimination, and Roman Catholics in Ireland were ruthlessly persecuted. *Id.*

Declaration of Breda on April 4, 1660.<sup>84</sup> The Declaration of Breda pledged a general pardon and paid lip service to both parliamentary supremacy and liberty of religious conscience. Regarding Parliamentary supremacy, Charles II pledged support for reenactment in 1660 of much of the legislation of the Puritan Long Parliament of 1641-42 whereby government by royal prerogative was abolished. Regarding religion, Charles II promised to permit “a liberty to tender consciences” permitting differences of opinion in matters of religion.

The Declaration of Breda was delivered to Parliament on May 1, and both houses unanimously declared Charles to be King Charles II on May 8, 1660. Although the restored Stuarts initially enjoyed great prestige, they soon reverted to the excesses of James I and Charles I. Charles II quickly renewed the Stuart claim that the king is above the law, repressed liberty of conscience, and challenged the supremacy of Parliament. James II continued and expanded these policies. As explained below, these policies provoked a second, “Glorious Revolution” that ended the Stuart dynasty forever.

The three great issues under the restored Stuarts involved the Clarendon Code of 1661-1665, the “Exclusion Crisis” of 1678-1681 (which required John Locke and his patron the Earl of Shaftesbury to flee England), and James II’s Declaration of Indulgence of 1688. The restored Stuarts again employed the Anglican Church as an instrument for repressing political opposition and liberty of conscience. The renewed Parliamentary conflicts focused on the restored Stuarts’ claim of a “dispensing power” to unilaterally exempt Roman Catholics from Parliament’s laws regulating religion.<sup>85</sup>

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<sup>84</sup> Carl Stephenson and Frederick George Marcham, “The Declaration of Breda (1660),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 532-33. The Declaration takes its name from the city of Breda in the Netherlands.

<sup>85</sup> One of the most important of these laws was the Test Act of 1673. Carl Stephenson and Frederick George Marcham, “First Test Act (1673),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 555-56. This act required all persons filling any civil or military office to take the oaths of supremacy and allegiance. They also had to subscribe to a declaration denying transubstantiation and

## 2. Charles II and the Clarendon Code (1661-1665)

The Clarendon Code was a series of four religious statutes passed between 1661 and 1665. The code took its name from Edward Hyde, Earl of Clarendon, who served as Lord Chancellor to Charles II and helped secure their passage. The Clarendon Code sought to compel a uniform state religion, the same goal which Charles I and Archbishop William Laud pursued a generation earlier at the cost of civil war. Directed against Presbyterians, Puritans, and Quakers, the Clarendon Code reestablished the supremacy of the Church of England and reversed the religious liberty afforded Quakers and dissenting Protestant groups under Cromwell. These statutes betrayed the promises of liberty of conscience in Charles II's Declaration of Breda, which Clarendon had helped write.

The Corporation Act of 1661<sup>86</sup> excluded all religious nonconformists from public office. The act accomplished this exclusion by requiring all municipal officials to take Anglican communion. They were also required to take an oath never to take arms against the king as well as rejecting the Solemn League and Covenant of 1643.<sup>87</sup>

The Act of Uniformity of 1662<sup>88</sup> excluded religious nonconformists from the ministry, from holding public office, and from teaching in any capacity, from private tutor to university

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receive the Anglican sacrament within three months after admittance to office. The oath for the Test Act of 1673 was: "I, \_\_\_, do declare that I do believe that there is not any transubstantiation in the sacrament of the Lord's Supper, or in the elements of the bread and wine, at or after the consecration thereof by any person whatsoever."

<sup>86</sup> Carl Stephenson and Frederick George Marcham, "Corporation Act (1661)," *Sources of English Constitutional History* (New York: Harper & Row, 1937) 542-43. The Corporation Act was not rescinded until 1828.

<sup>87</sup> The Solemn League and Covenant of 1643 was an agreement between Scottish Presbyterians and English Parliamentarians to establish Reformed Protestantism as the religion in Scotland, Ireland, and England in exchange for a military alliance between the Scots and the Parliamentarians against Charles I. The agreement was consummated during the first phase of the civil war.

<sup>88</sup> Carl Stephenson and Frederick George Marcham, "Act of Uniformity (1661)," *Sources of English Constitutional History* (New York: Harper & Row, 1937) 543-46. The Act of Uniformity was modified by the Act of Uniformity Amendment Act of 1872.

professor. The act accomplished this exclusion by requiring anyone employed in these professions to take an oath pledging (1) never to take arms against the king, (2) to comply with the liturgy of the Church of England, (3) to reject the Solemn League and Covenant of 1643, and (4) never to seek any change in the government of the state or the government of the church.

The Conventicle Act of 1664<sup>89</sup> prohibited “seditious conventicles,” meetings of five or more persons for “any exercise of religion in other manner than is allowed by the liturgy or practice of the Church of England.” Owners who “wittingly and willingly” permitted such meetings to take place on their property were equally culpable. Punishment for first offenders was three months’ imprisonment and a £5 fine. Second offenders received six months’ imprisonment and a £10 fine. The punishment for third offenders was transportation “to his majesty's plantations in the New World” for seven years.<sup>90</sup>

The act also required the episcopal ordination of all ministers. No preaching or lecturing was permitted without such ordination. More than two thousand members of the clergy refused to comply with this statute. These ministers were forced to resign their livings, an event known

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<sup>89</sup> Carl Stephenson and Frederick George Marcham, “Conventicle Act (1664),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 543-46. The Toleration Act expressly repealed the Conventicle Act in 1689. Carl Stephenson and Frederick George Marcham, “Toleration Act (1689),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 607-08.

<sup>90</sup> The English use of transportation as a criminal punishment began on a large scale under the Clarendon Code. Transportation was usually carried out by private merchants. Transportation to the Caribbean, Central American, and South American colonies as plantation laborers often resulted in death. A merchant who wished to transport a felon was required to pay the sheriff “a price per head that included jail fees, the fees of the clerk of the appropriate court, fees for drawing up the pardon, and so on.” J. M. Beattie, *Crime and the Courts in England: 1660-1800* (Princeton: Princeton U. P., 1986) 479. After transporting the felon to the New World, the merchant could sell him into indentured servitude for a term depending on his offense. This was a profitable transaction if the felon was young and healthy or had useful skills. Many felons did not bring enough return to pay the merchant's cost, however, with the result that many felons accumulated in jails intended as temporary holding places. In the 1670's Virginia and Maryland, where indentured servants worked tobacco plantations, passed laws prohibiting transportation, and “transportation to the mainland colonies was being seriously curtailed by the 1670's.” J. M. Beattie, *Crime and the Courts in England: 1660-1800* (Princeton: Princeton U. P., 1986) 479. The Toleration Act in 1689 expressly repealed the Conventicle Act.

as the “Great Ejection.” The lay preacher John Bunyan wrote his religious allegory *The Pilgrim’s Progress* in the Bedford jail while imprisoned under the Conventicle Act.

The Five Mile Act of 1665<sup>91</sup> forbade nonconforming ministers from coming within five miles of any city or town in England. It also forbade any person from teaching in a private or public school without first taking the oath required by the Act of Uniformity of 1662. The penalty for each violation was a £40 fine.

The enforcement of these acts excluded a large segment of the English population from participation in English universities, churches, and public life. The Earl of Clarendon was eventually impeached by the House of Commons for blatant violations of habeas corpus. Renewing the strategies employed by Charles I in the 1627 *Case of the Five Knights*, Clarendon arrested the King’s political opponents and had them “imprisoned against law, in remote islands, garrisons and other places” to prevent their access to a writ of habeas corpus.<sup>92</sup>

### **3. Charles II and the Exclusion Crisis (1678-1681)**

On March 15, 1672, Charles II issued a Royal Declaration of Indulgence exempting Roman Catholics from any penalties under English law.<sup>93</sup> This declaration alarmed Parliament for two reasons. First, the Declaration of Indulgence invoked the King’s arbitrary “dispensing power” to dispense the application of English law to subjects of the king’s choosing. The

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<sup>91</sup> Carl Stephenson and Frederick George Marcham, “Five-Mile Act (1665),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 554-55.

<sup>92</sup> Paul Delaney Halliday, *Habeas Corpus: From England to Empire* (Cambridge: Harvard U.P., 2010) 232. One such prisoner was the prominent Puritan leader Colonel John Hutchinson. Hutchinson was illegally arrested in retribution for his role in condemning Charles I in 1649. Hutchinson then died in captivity under suspicious circumstances. Henry Hallam, *The Constitutional History of England*, vol. 2 (London: Sheldon, 1862) 350. Clarendon fled to France rather than face trial, where he died in 1674. While in France, he wrote his *History of the Great Rebellion and Civil Wars in England*.

<sup>93</sup> Carl Stephenson and Frederick George Marcham, “Royal Declaration of Indulgence (1672),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 559-60.



Declaration dispensed with more than forty statutes.<sup>94</sup> This reasserted the royal prerogative on a grand scale in disregard of Charles II's promises in the Declaration of Breda and the constitutional supremacy established by Parliament prior to the Restoration.

Second, the Declaration of Indulgence corroborated Parliament's suspicions that a Roman Catholic sat on the English throne. These suspicions intensified when Charles II supported Catholic France in making war on the Protestant Dutch. Parliament's suspicions proved well-founded. Charles was received into the Roman Catholic Church on the final night of his life.<sup>95</sup>

When Parliament resumed, its first response was to force Charles to revoke the Declaration of Indulgence.<sup>96</sup> Parliament's second response was the Test Act of 1673.<sup>97</sup> Under this act, all civil and military officials were required to take Anglican communion within three months of receiving their office. They were also required to disavow the doctrine of transubstantiation.<sup>98</sup> Charles' brother, the future James II, was publicly revealed as a Catholic

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<sup>94</sup> Thomas Macaulay, *The History of England from the Ascension of James II* (New York: Harper, 1849) 206.

<sup>95</sup> Ronald Hutton, *Charles II: King of England, Scotland, and Ireland* (Oxford: Oxford UP, 1989) 443, 456.

<sup>96</sup> Thomas Macaulay, *The History of England from the Ascension of James II* (New York: Harper, 1849) 206.

<sup>97</sup> Carl Stephenson and Frederick George Marcham, "First Test Act (1673)," *Sources of English Constitutional History* (New York: Harper & Row, 1937) 555-56.

<sup>98</sup> "I, \_\_\_\_\_, do declare that I do believe that there is not any transubstantiation in the sacrament of the Lords' Supper, or in the elements of bread and wine, at or after the consecration there of by any person whatsoever." Carl Stephenson and Frederick George Marcham, "First Test Act (1673)," *Sources of English Constitutional History* (New York: Harper & Row, 1937) 556. In 1678, the Test Act was established to include all the House of Lords, who were not technically included in the first act. The oath was also enlarged to the following: "I, A.B., do solemnly and sincerely in the presence of God profess, testify, and declare, that I do believe that in the Sacrament of the Lord's Supper there is not any Transubstantiation of the elements of bread and wine into the Body and Blood of Christ at or after the consecration thereof by any person whatsoever: and that the invocation or adoration of the Virgin Mary or any other Saint, and the Sacrifice of the Mass, as they are now used in the Church of Rome, are superstitious and idolatrous." Oath takers were also required to swear that they took the oath "without thinking that I am or can be acquitted before God or man, or absolved of this declaration or any part thereof, although the Pope, or any other person or persons, or power whatsoever, should dispense with or

when he refused to comply with the Test Act and resigned his office of Lord High Admiral.<sup>99</sup> The failure of Charles II to produce an heir meant that the throne could possibly pass to a publicly avowed Roman Catholic, precipitating a constitutional crisis. Parliament's efforts to prevent the succession from passing to James became known as the "Exclusion Crisis."

The leader of the effort to exclude James from the royal succession was John Locke's patron, the Earl of Shaftesbury, and Locke was busily writing his *Two Treatises on Government* during this crisis.<sup>100</sup> Shaftesbury introduced his Exclusion Bill<sup>101</sup> on May 15, 1679. Fearing that supporters of the Exclusion Bill would be arrested and sent out of the country as Clarendon had done, Shaftesbury introduced the Habeas Corpus Act<sup>102</sup> eleven days later. The Habeas Corpus Act became law, but Shaftesbury's Exclusion Bill died in the House of Lords.

Shaftesbury's fear of arrest proved well-founded. Charles II had Shaftesbury arrested on July 2, 1681, and charged with high treason for introducing the Exclusion Bill. The case was dismissed for lack of evidence on February 8, 1682, when government prosecutors conceded their witnesses had perjured themselves.

On September 28, 1682, however, new sheriffs were installed who were sympathetic to Shaftesbury's political opponents.<sup>103</sup> The new sheriffs had the ability to pack the London juries. Fearing a second arrest and prosecution for treason, the prudent Shaftesbury fled to Holland in

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annul the same, or declare that it was null or void from the beginning." Carl Stephenson and Frederick George Marcham, "Second Test Act (1678)," *Sources of English Constitutional History* (New York: Harper & Row, 1937) 556-57.

<sup>99</sup> John Miller, *James II* (New Haven: Yale U.P., 2000) 69-71.

<sup>100</sup> Peter Laslett, "The English Revolution and Locke's 'Two Treatises of Government'," *Cambridge Historical Journal* 12 (1) (1956):40-55.

<sup>101</sup> Andrew Browning, ed., *English Historical Documents, 1660-1714* (New York: Routledge, 1996) 113-15.

<sup>102</sup> Carl Stephenson and Frederick George Marcham, "Habeas Corpus Act (1679)," *Sources of English Constitutional History* (New York: Harper & Row, 1937) 557-58.

<sup>103</sup> A.W. Ward, G.W. Prothero, and Stanley Leathes, eds., *The Cambridge Modern History*, vol. 5 (Cambridge: Cambridge UP, 1902) 229.

November, 1682.<sup>104</sup> John Locke was named as a suspect in the “Rye House Plot” to assassinate Charles II and James soon after, and Locke followed his patron to Holland in September, 1683.<sup>105</sup>

#### **4. James II Establishes a Standing Army (1685)**

James II ascended the throne on February 6, 1685. The Duke of Monmouth, the illegitimate Protestant son of Charles II, attempted to seize the throne in May, 1685. Monmouth was defeated at the battle of Sedgemoor on July 5, 1685, and executed at the Tower of London on July 15, 1685. Monmouth’s gruesome death, however, marked only the beginning of James II’s troubles.<sup>106</sup>

James refused to disband the army after the Monmouth rebellion was over, choosing instead to enlarge it without Parliament’s consent.<sup>107</sup> James then defied the Test Act of 1673 and placed his standing army under the command of Roman Catholic officers. The army was then stationed in locations viewed as threatening by London Protestants. Popular dismay at these actions deepened when Louis XIV revoked the Edict of Nantes on October 22, 1685.<sup>108</sup>

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<sup>104</sup> A.W. Ward, G.W. Prothero, and Stanley Leathes, eds., *The Cambridge Modern History*, vol. 5 (Cambridge: Cambridge UP, 1902) 230. Shaftesbury died in Holland on January 21, 1683, “embittered and broken.”

<sup>105</sup> There is no credible evidence that Locke was involved in the “Rye House Plot.” Philip Milton, “John Locke and the Rye House Plot,” *Historical J.* 43 (3) (2000): 647-68.

<sup>106</sup> The decapitation of Monmouth required an estimated eight axe blows. The executioner abandoned his task halfway through as the crowd reacted in horror and the body continued to move throughout the grisly episode. A knife was employed to finally sever the head from the body. Thomas Macaulay, *The History of England from the Ascension of James II* (New York: Harper, 1849) 580-81.

<sup>107</sup> The English Bill of Rights describes these events as follows: “By raising and keeping a standing army within this kingdom in time of peace, without consent of parliament, and quartering soldiers contrary to law. By causing several good subjects, being protestants, to be disarmed, at the same time when papists were both armed and employed, contrary to law.” Carl Stephenson and Frederick George Marcham, “The Bill of Rights (1689),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 599-602.

<sup>108</sup> Originally issued on April 10, 1598 by Henry IV of France, the Edict of Nantes granted civil liberties to Huguenots and ended religious violence in France. The revocation drove approximately 400,000 Protestants out of France, many of whom came to England, cementing Louis XIV’s reputation among English Protestants as a totalitarian monarch.

On November 9, 1685, James II gave a speech informing Parliament that he intended to dispense with the Test Act, appoint Roman Catholics to civil offices, and maintain command of the army under Roman Catholic officers.<sup>109</sup> Parliament formally objected to this policy, claiming that Catholics were incapacitated from holding these positions by law and that only Parliament could remove their incapacity.<sup>110</sup> James responded by proroguing and eventually dissolving Parliament.<sup>111</sup> Like Charles I before him in 1642, James II resolved to govern without Parliament. Parliament would never meet again during his reign.

James' Roman Catholic wife, Mary of Modena, publicly announced her pregnancy that same month. Protestants now feared the birth of a Roman Catholic heir. In 1686, the Court of the King's Bench in *Godden v. Hales* upheld the king's prerogative power to dispense with the Test Act and appoint Roman Catholic military officers.<sup>112</sup>

To a majority of Englishmen, James II had returned to the arbitrary absolutism of Charles I. James II ignored settled law by invoking the royal prerogative to "dispense" with the

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<sup>109</sup> Andrew Browning, ed., "Speech of James II in support of the standing army and the Catholic officers, and the address of the Commons in reply, 1685," *English Historical Documents, 1660-1714* (New York: Routledge, 1996) 81-82.

<sup>110</sup> Andrew Browning, ed., "Speech of James II in support of the standing army and the Catholic officers, and the address of the Commons in reply, 1685," *English Historical Documents, 1660-1714* (New York: Routledge, 1996) 82.

<sup>111</sup> James II prorogued Parliament on five consecutive occasions beginning November 20, 1685, and finally dissolved Parliament on July 2, 1687.

<sup>112</sup> Carl Stephenson and Frederick George Marcham, "Godden v. Hales (1686)," *Sources of English Constitutional History* (New York: Harper & Row, 1937) 582-83. Sir Edward Hales was a Catholic convert who served as the colonel of a regiment of foot and as a Lord of the Admiralty under James II. The Court stated the following in making its ruling: "We were satisfied in our judgments before and, having the concurrence of eleven out of twelve, we think we may very well declare the opinion of the court to be that the king may dispense in this case; and the judges go upon these grounds: 1. that the kings of England are sovereign princes; 2. that the laws of England are the king's laws; 3. that therefore it is an inseparable prerogative in the kings of England to dispense with penal laws in particular cases and upon particular necessary reasons; 4. that of those reasons and those necessities, the king himself is sole judge; and then, which is consequent upon all, 5. that this is not a trust invested in, or granted to, the king by the people, but the ancient remains of the sovereign power and prerogative of the kings of England; which never yet was taken from them, nor can be. And therefore, such a dispensation appearing upon record to come [in] time enough to save him from the forfeiture, judgment ought to be given for the defendant." *Id.* at 583.

Test Act. He deprived the people of any share of government by dissolving Parliament. He also maintained an illegal standing army without Parliamentary consent.

### **5. James II and the Declaration of Indulgence (April 24, 1688)**

The final act of the Stuart dynasty commenced on April 4, 1688, when James II deepened the constitutional crisis by issuing his Declaration of Indulgence.<sup>113</sup> The Declaration opened by stating the king's desire that all his subjects become Roman Catholic.<sup>114</sup> The Declaration then invoked the royal prerogative to suspend all penal laws in ecclesiastical matters.<sup>115</sup>

Although the language of the Declaration applied to all religious worship, James' opponents remembered Charles II's false promises in the 1660 Declaration of Breda and feared the Indulgence was a ploy to re-establish Roman Catholicism in England. Anglicans feared the Indulgence would, at a minimum, disestablish the Anglican Church. Even James' former supporters in Parliament opposed the Declaration as an arbitrary use of the royal prerogative in violation of Parliament's powers.

### **6. James II and the Trial of the Seven Bishops (June 29-30, 1688)**

On May 4, 1688, James II ordered his Declaration of Indulgence to be read from the pulpit of every Anglican church and chapel in England.<sup>116</sup> Tensions heightened on June 10 when

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<sup>113</sup> Andrew Browning, ed., "Declaration of Indulgence, 1687," *English Historical Documents, 1660-1714* (New York: Routledge, 1996) 395-97.

<sup>114</sup> Andrew Browning, ed., "Declaration of Indulgence, 1687," *English Historical Documents, 1660-1714* (New York: Routledge, 1996) 395: "We cannot but heartily wish, as it will easily be believed, that all the people of our dominions were members of the Catholic Church."

<sup>115</sup> Andrew Browning, ed., "Declaration of Indulgence, 1687," *English Historical Documents, 1660-1714* (New York: Routledge, 1996) 396: "We do likewise declare, that it is our royal will and pleasure, that from henceforth the execution of all and all manner of penal laws in matters ecclesiastical, for not coming to church, or not receiving the Sacrament, or for any other nonconformity to the religion established, or for or by reason of the exercise of religion in any manner whatsoever, be immediately suspended; and the further execution of the said penal laws and every of them is hereby suspended."

<sup>116</sup> Andrew Browning, ed., "Order in Council requiring James II's declaration of indulgence to be read in churches, 1688," *English Historical Documents, 1660-1714* (New York: Routledge, 1996) 83.

Mary of Modena gave birth to a son. On June 18, two days before the Declaration was to be read from the pulpits, seven bishops of the Anglican Church petitioned James in a personal audience to withdraw his order.

The bishops' petition explained that James' "declaration is founded upon such a dispensing power as hath often been declared illegal in parliament, and particularly in the years 1662, 1672, and in the beginning of your Majesty's reign."<sup>117</sup> The king read the petition and declared it to be a "standard of rebellion." "God has given me the dispensing power and I will retain it," he stated angrily. "I will be obeyed. My declaration shall be published. You are trumpeters of sedition."<sup>118</sup>

Although the Bishops' petition was presented to the king in private, it was in public circulation by that evening. An angry James II arrested the Bishops and charged them with publication of a seditious libel.

The "Trial of the Seven Bishops" took place before a jury in the Court of the King's Bench on June 29 and 30, 1688. The Crown's burden included proving that the Bishops' petition of was (1) false, (2) malicious, and (3) tended towards sedition. In summing up the evidence before the jury's deliberations,<sup>119</sup> Justice Powell stated that there was no evidence of falsity or malice. Furthermore, in his judgment, the Declaration of Indulgence was a nullity, and James II's recent exercises of the dispensing power were utterly inconsistent with all law. If these encroachments of prerogative were allowed, Powell warned, that would be the end of Parliaments. "If this be once allowed of, there will need no Parliament; all the Legislature will be

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<sup>117</sup> Carl Stephenson and Frederick George Marcham, "The Case of the Seven Bishops (1688)," *Sources of English Constitutional History* (New York: Harper & Row, 1937) 583-84.

<sup>118</sup> Thomas Macaulay, *The History of England from the Ascension of James II* (New York: Harper, 1849) 168-69.

<sup>119</sup> English procedure allows the judges to give the jury their evaluation of the proof offered by both sides before the jury deliberates. American procedure strictly forbids such "comments on the weight of the evidence," and universally holds such comments to be reversible error.

in the King-which is a thing worth considering, and I leave the issue to God and your consciences.”<sup>120</sup>

## **G. The Glorious Revolution (1688)**

### **1. William of Orange Lands at Brixham (November 5, 1688)**

The jury acquitted the Bishops to widespread public rejoicing.<sup>121</sup> On that same day, seven prominent Englishmen sent a letter of invitation to the Protestant William of Orange, husband of James II's Protestant daughter Mary, pledging their support if William would land in England with a small army.<sup>122</sup> William landed at Brixham in southwest England on November 5, 1688. He led an invasion force of 11,000 soldiers and 4,000 cavalry. James II fled to France on December 23, 1688.

Parliament finally had constitutional supremacy within its grasp and with it the end of arbitrary monarchies. Cognizant however of Macbeth's observation that “To be thus is nothing; But to be safely, thus,” Parliament busied itself in securing its constitutional supremacy. A

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<sup>120</sup> Carl Stephenson and Frederick George Marcham, “The Case of the Seven Bishops (1688),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 586.

<sup>121</sup> Thomas Macaulay, *The History of England from the Ascension of James II* (New York: Harper, 1849) 199. Macaulay gives a detailed description of the trial and the jury's deliberations at pages 188-204, describing the public reaction to the acquittal at page 199: “At that signal, benches and galleries raised a shout. In a moment ten thousand persons, who crowded the great hall, replied with a still louder shout, which made the old oaken roof crack; and in another moment the innumerable throng without set up a third huzza, which was heard at Temple Bar. The boats which covered the Thames gave an answering cheer. A peal of gunpowder was heard on the water, and another, and another; and so, in a few moments, the glad tidings went flying past the Savoy and the Friars to London Bridge, and to the forest of masts below. As the news spread, streets and squares, market places and coffee-houses, broke forth into acclamations. Yet were the acclamations less strange than the weeping. For the feelings of men had been wound up to such a point that at length the stern English nature, so little used to outward signs of emotion, gave way, and thousands sobbed aloud for very joy.”

<sup>122</sup> Andrew Browning, ed., “Letter of invitation to William of Orange, 1688,” *English Historical Documents, 1660-1714* (New York: Routledge, 1996) 120-22. The seven signatories, popularly known as the “Seven Immortals,” included the Earl of Danby, the Earl of Shrewsbury, the Earl of Devonshire, the Viscount Lumley, Henry Compton, Bishop of London, Edward Russell, and Henry Sydney. This group included members of Parliament that had been continuously prorogued by James II from November 20, 1685 until its final dissolution on July 2, 1687. William had requested such an invitation to ameliorate public resentment at an armed landing by a foreign power. Thomas Macaulay, *The History of England from the Ascension of James II* (New York: Harper, 1849) 216.

Convention Parliament convened on January 22, 1689. On January 29, Parliament resolved that England was a Protestant kingdom and that only a Protestant could be King. All Roman Catholic claimants to the throne were disinherited by law.

## **2. William and Mary Publicly Accept the Declaration of Right (February 13, 1689)**

The ship carrying Mary, Princess of Orange docked at Greenwich February 13, 1689.<sup>123</sup> John Locke was among its passengers. Later that day, Parliament met with William and Mary at Whitehall in the Banqueting House,<sup>124</sup> the site of Charles I's beheading forty years earlier.

The Convention Parliament read its Declaration of Right aloud. The Declaration recounted twelve categories of arbitrary powers illegally exercised by James II.<sup>125</sup> The Declaration then declared that James II had abdicated the throne, and offered the crown to William and Mary on condition that they recognize the supremacy of Parliament and thirteen

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<sup>123</sup> Thomas Macaulay, *The History of England from the Ascension of James II* (New York: Harper, 1849) 440.

<sup>124</sup> Thomas Macaulay, *The History of England from the Ascension of James II* (New York: Harper, 1849) 441.

<sup>125</sup> Carl Stephenson and Frederick George Marcham, "The Bill of Rights (1689)," *Sources of English Constitutional History* (New York: Harper & Row, 1937) 600-601: "Whereas the late King *James* the Second, by the assistance of divers evil counsellors, judges, and ministers employed by him, did endeavour to subvert and extirpate the protestant religion, and the laws and liberties of this kingdom. 1. By assuming and exercising a power of dispensing with and suspending of laws, and the execution of laws, without consent of parliament. 2. By committing and prosecuting divers worthy prelates, for humbly petitioning to be excused from concurring to the said assumed power. 3. By issuing and causing to be executed a commission under the great seal for erecting a court called, *the court of commissioners for ecclesiastical causes*. 4. By levying money for and to the use of the crown, by pretence of prerogative, for other time, and in other manner, than the same was granted by parliament. 5. By raising and keeping a standing army within this kingdom in time of peace, without consent of parliament, and quartering soldiers contrary to law. 6. By causing several good subjects, being protestants, to be disarmed, at the same time when papists were both armed and employed, contrary to law. 7. By violating the freedom of election of members to serve in parliament. 8. By prosecutions in the court of King's Bench, for matters and causes cognizable only in parliament; and by divers other arbitrary and illegal courses. 9. And whereas of late years, partial, corrupt, and unqualified persons have been returned and served on juries in trials, and particularly divers jurors in trials for high treason, which were not freeholders. 10. And excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects. 11. And excessive fines have been imposed; and illegal and cruel punishments have been inflicted. 12. And several grants and promises made of fines and forfeitures, before any conviction or judgment against the persons, upon whom the same were to be levied. All which are utterly and directly contrary to the known laws and statutes, and freedom of this realm."



rights protecting English subjects from the arbitrary exercise of power demonstrated by James II.<sup>126</sup> Each right was a response to the arbitrary exercises of power named earlier in the Bill of Rights. When the reading of the Declaration of Right was concluded, William said, “We thankfully accept what you have offered us.” As Lord Macaulay writes, “Thus was consummated the English revolution.”<sup>127</sup> The Declaration of Right was codified as law on December 16, 1689, as the English Bill of Rights.<sup>128</sup>

### **3. William III Vetoes the Judges Bill (February 24, 1691)**

Parliament recognized that freedom from arbitrary monarchies could never be secured so long as judicial appointments remained politicized and within the Crown’s control. During the course of the Stuart dynasty, Sir Edward Coke had helped to establish the supremacy of the

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<sup>126</sup> Carl Stephenson and Frederick George Marcham, “The Bill of Rights (1689),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 599-602. The thirteen protected rights included the following: “1. That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal. 2. That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal. 3. That the commission for erecting the late court of commissioners for ecclesiastical causes, and all other commissions and courts of like nature are illegal and pernicious. 4. That levying money for or to the use of the crown, by pretence of prerogative, without grant of parliament, for longer time, or in other manner than the same is or shall be granted, is illegal. 5. That it is the right of the subjects to petition the King, and all committments [sic] and prosecutions for such petitioning are illegal. 6. That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law. 7. That the subjects which are protestants, may have arms for their defence suitable to their conditions, and as allowed by law. 8. That election of members of parliament ought to be free. 9. That the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament. 10. That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted. 11. That jurors ought to be duly impanelled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders. 12. That all grants and promises of fines and forfeitures of particular persons before conviction, are illegal and void. 13. And that for redress of all grievances, and for the amending, strengthening, and preserving of the laws, parliaments ought to be held frequently.”

<sup>127</sup> Thomas Macaulay, *The History of England from the Ascension of James II* (New York: Harper, 1849) 442.

<sup>128</sup> Carl Stephenson and Frederick George Marcham, “The Bill of Rights (1689),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 599-602. This action was required to remove any question regarding the binding legal status of the rights in the Declaration of Rights. The Constitutional Parliament that had drawn up the Declaration of Right on February 13, 1689 had not been appointed by a king. Its validity was thus open to challenge under English law.

common law courts over the prerogative courts.<sup>129</sup> Parliament had also abolished the most abusive courts of the royal prerogative, including the Court of the Star Chamber and the Court of the High Commission.<sup>130</sup>

The Crown nevertheless retained the powers to appoint and remove judges. In order to ensure the loyalty of the higher judiciary, the “twelve men in scarlet,”<sup>131</sup> the Crown used loyalty to the king, the hereditary succession, and the established church as political tests for appointment.<sup>132</sup> The result was a biased bench that rendered result oriented decisions, based not on the law, but on partiality to the king’s will. Rather than ensuring a government based on law, these courts enabled royal absolutism and set the nation on the course to civil war. The twelve

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<sup>129</sup> Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge: Harvard UP, 2003) 213-216. “In a series of cases decided between 1606 and 1616, Coke, as Chief Justice first of Common Pleas and then of King’s Bench, proclaimed the supremacy of the common law conceived as an ancient English tradition. He ultimately challenged the authority of the king himself to limit the competence of the common law courts to determine their own competence. In 1616, after a dramatic personal confrontation, James [I] dismissed Coke. Coke’s assertion of the independence of the common law courts and their supremacy over the prerogative courts helped to define one of the main issues which were ultimately fought out in Parliament and on the battlefields of the Civil War: the issue of royal absolutism.”

<sup>130</sup> Prerogative courts were courts established to enforce the king’s will and prerogative rather than the common law. Prerogative courts included the Court of the Exchequer, the High Court of Chancery, the High Court of Admiralty, the Court of the Star Chamber, and the Court of the High Commission. Parliament had abolished the prerogative courts of the Court of the Star Chamber, the Court of the Council of the North, the Court of the Council in the marches of Wales, the Court of the Duchy of Lancaster, the Court of the Exchequer of the County Palatine of Chester, and the Court of the High Commission in 1641. Carl Stephenson and Frederick George Marcham, “Act Abolishing Arbitrary Courts (1641),” and Act Abolishing the Court of the High Commission (1641),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 479-81. Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge: Harvard UP, 2003) 217, 456 n.32.

<sup>131</sup> “Twelve men in scarlet” refers to the Chief Justice and three Associate Justices of each of the three “central courts,” the Court of the King’s Bench, the Court of Common Pleas, and the Court of the Exchequer.

<sup>132</sup> Robert M. Bliss, *Revolution and Empire: English Politics and the American Colonies in the Seventeenth Century* (New York: Manchester U.P., 1990) 225.

members of the higher judiciary were held in such low esteem by 1688 that its members were considered incompetent to render legal advice.<sup>133</sup>

Parliament acted to establish an independent judiciary. Both houses passed the Judges Bill of 1691, providing that judges could not be dismissed by the king. William refused to release his hold on the judiciary, however, and vetoed the bill on February 24, 1691.<sup>134</sup>

This veto of Parliament was the first of William's reign, and generated significant public resentment.<sup>135</sup> William's veto was just one of a series of intermittent efforts to reassert royal supremacy.<sup>136</sup> The people and the Parliament were realizing with William III,<sup>137</sup> as they had previously with Charles II<sup>138</sup> and with Cromwell,<sup>139</sup> that promises to abide by constitutional limits on power are often forgotten once the reins of power are firmly grasped.

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<sup>133</sup> Thomas Macaulay, *The History of England from the Ascension of James II* (New York: Harper, 1849) 380: "On Saturday the twenty-second the Lords met in their own house. That day was employed in settling the order of proceeding. A clerk was appointed: and, *as no confidence could be placed in any of the twelve Judges, some Serjeants and barristers of great note were requested to attend, for the purpose of giving advice on legal points.*" [Emphasis added].

<sup>134</sup> Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge: Harvard UP, 2003) 227. Henry Horowitz, *Parliament, Policy, and Politics in the Reign of William III* (Manchester: Manchester U.P., 1977) 75-76.

<sup>135</sup> Henry Horowitz, *Parliament, Policy, and Politics in the Reign of William III* (Manchester: Manchester U.P., 1977) 75-76.

<sup>136</sup> Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge: Harvard UP, 2003) 227-28.

<sup>137</sup> William III had publicly listened and consented to the Declaration of Rights, its condemnations of James II's arbitrary rule, and its bill of rights as limits on the Crown's constitutional powers as a condition of receiving the throne on February 13, 1689. Thomas Macaulay, *The History of England from the Ascension of James II* (New York: Harper, 1849) 442. Carl Stephenson and Frederick George Marcham, "The Bill of Rights (1689)," *Sources of English Constitutional History* (New York: Harper & Row, 1937) 599-602.

<sup>138</sup> One month before being restored to the throne, and in an effort to secure the Stuart restoration, Charles II issued his Declaration of Breda on April 4, 1660. Carl Stephenson and Frederick George Marcham, "The Declaration of Breda (1660)," *Sources of English Constitutional History* (New York: Harper & Row, 1937) 532-33. Charles II's Declaration of Breda paid lip service to both parliamentary supremacy and liberty of religious conscience. Regarding Parliamentary supremacy, Charles II pledged support for reenactment in 1660 of much of the legislation of the Puritan Long Parliament of 1641-42 whereby government by royal prerogative was abolished. Regarding religion, Charles II promised to permit "a liberty to tender consciences" permitting differences of opinion in matters of religion, only to procure enactment of the repressive Clarendon Code once he was on the throne. The failure by Charles II and

#### 4. The Act of Settlement (June 12, 1701)

This realization led to the final event in the English legal revolution, the Act of Settlement of 1701.<sup>140</sup> The Act describes itself as “An act for the further limitation of the crown and better securing the rights and liberties of the subject,” and the Act was designed to resolve any lingering doubts regarding Parliament’s constitutional supremacy.

The Act reduced royal influence over the judiciary. Judicial appointments were no longer at the Crown’s pleasure. Judicial commissions were granted *quamdiu se bene gesserint*, “during good behavior” for life. Judges could only be removed by agreement of both houses of Parliament.

The Act also reduced royal influence over Parliament. No person who held an office under the crown or received a pension from the crown could sit as a Member of Parliament. The crown was also stripped of its power to pardon those impeached by Parliament.

The Act also revised the coronation oath. Previous monarchs swore to keep the laws and customs of their predecessors, making no mention of Parliament. The new oath required all new

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James II to honor these promises renewed all the disputes that led to civil war, and ultimately to the “Glorious Revolution” of 1688 and the demise of the Stuart dynasty.

<sup>139</sup> Cromwell led the Parliamentary forces in civil war as a consequence of Charles I’s eleven years of “personal rule” by royal prerogative, climaxed by Charles’ entry into the Long Parliament at the head of four hundred armed men on January 4, 1642. Nevertheless, on April 20, 1653, frustrated by two years of Parliamentary inaction, Cromwell repeated Charles I’s disgraceful action, clearing the Parliamentary chamber with the assistance of forty musketeers and dissolving the Rump Parliament by force. Charles Henry Parry, *The Parliament and Councils of England, From the Reign of William I to the Revolution in 1688* (London: Murray, 1889) 510. Cromwell stated: “You are no longer a Parliament. I tell you, you are no longer a Parliament. The Lord has done with you. He has chosen other Instruments for carrying on his Work... it is you who have forced me upon this. I have sought the Lord, night and day, that he would rather slay me and put me upon this work. (Commanding the Soldiers to clear the Hall, he goes out last himself, and ordering the Doors to be locked, departs the House).” *Id.* Cromwell then exerted his own “personal rule,” ruling the three kingdoms as a *de facto* dictator until his death on September 3, 1658.

<sup>140</sup> Carl Stephenson and Frederick George Marcham, “The Act of Settlement (1701),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 610-612. In addition to provisions discussed in the text, the act provided for the succession to the throne and barred Roman Catholics from the throne forever.

monarchs to swear that they would govern “according to the Statutes in Parliament agreed on, and the Laws and Customs of the same.”<sup>141</sup>

### III. Two Pragmatic Principles Transform English Law

As the foregoing account demonstrates, the natural law tradition in the common law developed as a pragmatic response to the arbitrary rule of English monarchs. The above discussion sets out twenty-two acts of Parliament <sup>142</sup> that constitute direct responses to specific

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<sup>141</sup> Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge: Harvard UP, 2003) 228.

<sup>142</sup> See, in order of discussion, Carl Stephenson and Frederick George Marcham, “The Bill of Rights (1689),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 600-601; Carl Stephenson and Frederick George Marcham, “Petition of Right (1628),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 450-52; Carl Stephenson and Frederick George Marcham, “Resolutions of the Commons (1629),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 454-55; Carl Stephenson and Frederick George Marcham, “Act Abolishing Arbitrary Courts (1641),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 479-80; Carl Stephenson and Frederick George Marcham, “Act Abolishing the Court of the High Commission (1641),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 479-80; Samuel Rawson Gardiner, ed., “The Grand Remonstrance with the Petition Accompanying It,” *The Constitutional Documents of the Puritan Revolution 1625-1660* (Oxford, Oxford U.P., 1906) 202-231; Carl Stephenson and Frederick George Marcham, “Act for the Attainder of Strafford (1641),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 477-78; Carl Stephenson and Frederick George Marcham, “Triennial Act (1641),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 476-77; Carl Stephenson and Frederick George Marcham, “Act to Continue the Existing Parliament (1641),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 477; Carl Stephenson and Frederick George Marcham, “Act Abolishing Ship Money (1641),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 477; Carl Stephenson and Frederick George Marcham, “Tonnage and Poundage Act (1641),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 478-79; Carl Stephenson and Frederick George Marcham, “Act Defining Forests and Forest Law (1641),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 482-83; Carl Stephenson and Frederick George Marcham, “Act Abolishing Fines for Distrain of Knighthood (1641),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 483; Carl Stephenson and Frederick George Marcham, “Act Abolishing Temporal Power of the Clergy (1641),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 486; Carl Stephenson and Frederick George Marcham, “The Militia Ordinance (1642),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 486; Carl Stephenson and Frederick George Marcham, “Act Erecting a High Court of Justice (6 January),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 516; Samuel Rawson Gardiner, *A History of the Great Civil War, 1642-1649*, vol. 3 (London: Longman’s, 1891) 597; Carl Stephenson and Frederick George Marcham, “Act Abolishing the Kingship (1649),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 521-22; Carl Stephenson and Frederick George Marcham, “Act Abolishing the House of Lords (1649),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 522; Carl Stephenson and Frederick George Marcham, “Act Establishing the Commonwealth (1649),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 523-24; Carl Stephenson and Frederick George Marcham, “First Test Act (1673),” *Sources of English Constitutional History* (New York: Harper & Row, 1937) 555-

instances of arbitrary rule. The thirteen rights contained in the Bill of Rights were direct reactions to twelve specific instances of arbitrary rule by the Stuart kings.<sup>143</sup> To make this clear, the twelve instances of arbitrary rule were carefully listed in the Bill of Rights itself.<sup>144</sup>

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56; Carl Stephenson and Frederick George Marcham, "Second Test Act (1678)," *Sources of English Constitutional History* (New York: Harper & Row, 1937) 556-57; Carl Stephenson and Frederick George Marcham, "The Act of Settlement (1701)," *Sources of English Constitutional History* (New York: Harper & Row, 1937) 610-612.

<sup>143</sup> Carl Stephenson and Frederick George Marcham, "The Bill of Rights (1689)," *Sources of English Constitutional History* (New York: Harper & Row, 1937) 599-602. The thirteen protected rights included the following: "1. That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal. 2. That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal. 3. That the commission for erecting the late court of commissioners for ecclesiastical causes, and all other commissions and courts of like nature are illegal and pernicious. 4. That levying money for or to the use of the crown, by pretence of prerogative, without grant of parliament, for longer time, or in other manner than the same is or shall be granted, is illegal. 5. That it is the right of the subjects to petition the King, and all committments [sic] and prosecutions for such petitioning are illegal. 6. That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law. 7. That the subjects which are protestants, may have arms for their defence suitable to their conditions, and as allowed by law. 8. That election of members of parliament ought to be free. 9. That the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament. 10. That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted. 11. That jurors ought to be duly impanelled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders. 12. That all grants and promises of fines and forfeitures of particular persons before conviction, are illegal and void. 13. And that for redress of all grievances, and for the amending, strengthening, and preserving of the laws, parliaments ought to be held frequently."

<sup>144</sup> Carl Stephenson and Frederick George Marcham, "The Bill of Rights (1689)," *Sources of English Constitutional History* (New York: Harper & Row, 1937) 600-601: "Whereas the late King James the Second, by the assistance of divers evil counsellors, judges, and ministers employed by him, did endeavour to subvert and extirpate the protestant religion, and the laws and liberties of this kingdom. 1. By assuming and exercising a power of dispensing with and suspending of laws, and the execution of laws, without consent of parliament. 2. By committing and prosecuting divers worthy prelates, for humbly petitioning to be excused from concurring to the said assumed power. 3. By issuing and causing to be executed a commission under the great seal for erecting a court called, *the court of commissioners for ecclesiastical causes*. 4. By levying money for and to the use of the crown, by pretence of prerogative, for other time, and in other manner, than the same was granted by parliament. 5. By raising and keeping a standing army within this kingdom in time of peace, without consent of parliament, and quartering soldiers contrary to law. 6. By causing several good subjects, being protestants, to be disarmed, at the same time when papists were both armed and employed, contrary to law. 7. By violating the freedom of election of members to serve in parliament. 8. By prosecutions in the court of King's Bench, for matters and causes cognizable only in parliament; and by divers other arbitrary and illegal courses. 9. And whereas of late years, partial, corrupt, and unqualified persons have been returned and served on juries in trials, and particularly divers jurors in trials for high treason, which were not freeholders. 10. And excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects. 11. And excessive fines have been imposed; and illegal and cruel punishments have been inflicted. 12. And several grants and promises made of fines and forfeitures, before any conviction or

The pragmatic process that generated these statutes and rights also generated the principles of government and law contained in the works of Locke and Blackstone. Natural law jurisprudence synthesizes the lessons of the English Revolution into a framework of practical principles. These principles originate in experience “from the bottom up.”

Locke and Blackstone share two fundamental principles that emerged from the English constitutional struggles of 1603-1701. These principles radically transformed common law jurisprudence. The first principle is the requirement of *autonomy* in law, the requirement that law is supreme over political rulers. Both ruler and the ruled must be subject to the same laws, and the rulers may not arbitrarily change the law to reflect their will.<sup>145</sup> The second principle is Locke’s claim that all power derives its legitimacy from the *consent* of the governed.<sup>146</sup> For Blackstone, the consent of the governed determines the legitimacy of law. Common law is based on long-standing and freely adopted custom, and such custom evidences universal consent.<sup>147</sup>

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judgment against the persons, upon whom the same were to be levied. All which are utterly and directly contrary to the known laws and statutes, and freedom of this realm.”

<sup>145</sup> Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge: Harvard UP, 2003) 5: “The historicity of law, as it came to be understood in the West in the twelfth century and thereafter, was linked with the concept of its autonomy and of its supremacy over political rulers. The supreme political authority—the king, the pope himself—may make law, it was said, but he may not make it arbitrarily, and until he has remade it—lawfully—he is bound by it. In Bracton’s famous words, written in the early thirteenth century, ‘the King must not be under man but under God and under the law, because law makes the King.’” “Rex non debet esse sub homine sed sub deo et sub lege, quia lex fecit regem.” Henry de Bracton, *De Legibus et Consuetudinibus Angliae (On the Laws and Customs of England)*, ed. George E. Woodbine, trans. Samuel E. Thorne, vol. 1 (Cambridge: Harvard UP, 1968) 33.

<sup>146</sup> John Locke, *The Second Treatise of Government and A Letter concerning Toleration* (Mineola, NY: Dover, 2002) 44: “95. Men being, as has been said, by nature all free, equal, and independent, no one can be put out of this estate, and subjected to the political power of another, *without his own consent*. The only way whereby anyone divests himself of his natural liberty and puts on the bonds of civil society is by agreeing with other men to join and unite into a community...” [Emphasis added].

<sup>147</sup> Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 393, in which Blackstone states that the common law is “nothing else but *custom, arising from the universal agreement of the whole community*.” At page 21, Blackstone writes: “And this immemorial usage is binding upon all parties; as *it is in its nature an evidence of universal consent and acquiescence*, and with reason supposes a real composition to have been formerly made.” [Emphasis added].

Acts of Parliament evidence consent because they are enacted by the legitimate representatives of the governed.<sup>148</sup>

#### **IV. Goal and Philosophical Method**

The goal of this dissertation is to establish a new standard of legal validity using a different philosophical method from those used by natural law theory and legal positivism. The standard for legal validity represents the most fundamental issue for any legal system because legal validity determines the enforceability of law. The English Revolution of 1603-1701 illustrates the problems created by the lack of a uniformly recognized standard of legal validity.

The natural law standard of legal validity formulated by Locke and Blackstone dominated American jurisprudence until the second half of the 20th century when a new standard based on legal positivism began to displace it. Today, as in seventeenth century England, there is no uniformly recognized standard for legal validity in American jurisprudence. Jurists divide between the incompatible standards provided by natural law and positivism.

The validity schism in American jurisprudence produces, in turn, a chain reaction of secondary schisms involving the selection of judges, the appropriate role of judges, the interpretation of statutes, and the interpretation of the Constitution. These conflicts affect every individual living under American law. One troubling consequence of this schism is the emergence of two opposing bodies of precedent. Another is a developing juristocracy in which unelected judges decide policy issues without public input.

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<sup>148</sup> Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1840) 33: “By the sovereign power, as was before observed, is meant the making of laws; for wherever that power resides, all others must conform to and be directed by it, whatever appearance the outward form and administration of the government may put on. In a democracy ... the right of making laws resides in the people at large.” Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1840) 101: “For no subject of England can be constrained to pay any aids or taxes, even for the defence of the realm or the support of government, *but such as are imposed by his own consent*, or that of his representatives in parliament.” [Emphasis added].



Despite fifty years of debate, the opposing camps remain as unreconciled as ever. The validity schism persists because the validity standards offered by natural law and legal positivism are both inadequate. The goal of this dissertation is to promulgate a new standard for legal validity that overcomes these inadequacies and offers a pragmatic guide for lawyers, judges, and philosophers in determining the validity of law.

The first step in accomplishing this goal is identifying the inadequacies of the validity standards advanced by natural law and legal positivism. The second step is selecting a philosophical method to overcome these inadequacies. The final step is evaluating legal principles to formulate a pragmatic standard of legal validity.

#### **A. Inadequacies of the Natural Law Standard for Legal Validity**

The natural law tradition in English common law, concretized in the works of Locke and Blackstone, reflects the theories, intuitions, and theology that emerged from the turbulence of seventeenth century England. Natural law recognizes the validity of positive law but denies enforcement of any law that violates its validity standard. The task of the natural law jurist is to formulate a standard for legal validity within parameters dictated by human reason and divine law.

Natural law fails to formulate an adequate validity standard for two reasons. The first is its reliance on divine law. There is no general agreement regarding the terms of divine law, and many reject its very existence. As John Austin observes, “the laws of God are not always certain.”<sup>149</sup>

Second, natural law theory adopts inconsistent views of human reason. On one hand, human reason is acceptable to natural law theorists as a reliable guide in discerning the precepts

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<sup>149</sup> John Austin, *The Province of Jurisprudence Determined* (Amherst, NY: Prometheus, 2000) 186.

of natural law.<sup>150</sup> On the other hand, human reason is too corrupt to generate reliable human law. This corruption requires recourse to divine law as the standard for determining the validity of human law.<sup>151</sup>

## **B. Inadequacies of the Legal Positivist Standard for Legal Validity**

Chapter II explains the origin of the legal positivist tradition in Bentham's rejection of Blackstone's jurisprudence. Starting with Bentham, and continuing through John Austin and H.L.A. Hart, legal positivism applies linguistic analysis to describe law as a simple system of rules created by a political sovereign and enforced by sanctions. The positivist's goal is a definition for law that lists the “existence conditions” of law, those characteristics common to all laws in all societies.

Legal positivism dominates contemporary legal philosophy. Positivist methodology is so widely accepted among legal philosophers that the leading opponents of legal positivism often adopt its methodology in voicing their criticisms.<sup>152</sup> Nevertheless, legal positivism bears little fruit for the jurist or legal practitioner seeking just results in actual cases.

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<sup>150</sup> John Locke, *The Second Treatise of Government and A Letter concerning Toleration* (Mineola: Dover Publications, 2002) 3.

<sup>151</sup> John Locke, *The Second Treatise of Government and A Letter concerning Toleration* (Mineola: Dover Publications, 2002) 6.

<sup>152</sup> The most notable example of this phenomenon is Ronald Dworkin's “semantic sting” criticism of H.L.A. Hart. See Ronald Dworkin, *Law's Empire* (Cambridge: Harvard UP, 1986) 32, 45. This argument has set the agenda for much of the recent debate in the Philosophy of Law. Dworkin argues that legal positivists have a misguided view of language, and of the relation between law and language. Legal positivists such as Hart suffer from a “semantic sting” because of their insistence “that lawyers all follow certain linguistic criteria for judging propositions of law.” Dworkin claims that legal theories like Hart's cannot explain theoretical disagreement in legal practice. They think that lawyers share uncontroversial tests provided by the conventional meaning of the word “law” for the truth of propositions of law. The semantic sting is the misconception that the language of the law can be meaningful *only if* lawyers share such criteria. Dworkin argues that the semantic sting is fatal to legal positivism because it leads the positivist theorist to think that people cannot have any “substantive” disagreement about the law.

## 1. The Fruitlessness of Legal Positivism

Legal positivism is concerned almost exclusively with the question, “what makes a law?” This question is of little interest to legal professionals, who already know the applicable law in their case. The question of concern for legal professionals is “what makes a *good* law?”

Legal positivism intentionally excludes this question from legal philosophy. The dissection of “what law *is*” from “what law *ought to be*” is, in fact, the credo of legal positivism.<sup>153</sup> Legal positivism rejects any philosophical method that addresses the issue of what law *ought to be*. Legal positivism thus accepts “morally iniquitous laws” as perfectly valid and enforceable, even if their content possesses “no moral justification or force whatsoever.”<sup>154</sup>

For all of its analytical clarity, legal positivism is a largely fruitless endeavor. It provides no pragmatic guidance to judges, lawyers, or juries. In fact, practicing lawyers and jurists often react to the positivist acceptance of morally iniquitous laws with surprise and disbelief. One reason for this reaction is the fact that lawyers and jurists must cope with the results in their cases. Legal philosophers, on the other hand, enjoy the insulation of theory and hypothesis. Executions do not occur in classrooms.

## 2. Legal Positivism Commits the Philosophical Fallacy

The fruitlessness of legal positivism results from two aspects of its methodology. First, legal positivism commits the error Dewey calls the philosophical or analytical fallacy by separating law from its historical and social contexts.<sup>155</sup> Legal positivism analyzes law based on

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<sup>153</sup> H. L. A. Hart, “Positivism and the Separation of Law and Morals,” *Harv. L. Rev.* 71 (4) (1958): 593–629, 594.

<sup>154</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 268.

<sup>155</sup> John Dewey, “Context and Thought,” *The Later Works of John Dewey*, ed. Jo Ann Boydston, Vol. 6 (Carbondale, IL: S. Illinois UP, 1985) 5-7. Dewey describes this error as “the habit of philosophers of neglecting the indispensability of context, both in particular and in general. I should venture to assert that the most pervasive fallacy of philosophic thinking goes back to neglect of context.” See discussion of this fallacy in Gregory F. Pappas, *John Dewey’s Ethics: Democracy as Experience* (Bloomington, IN: Indiana UP, 2008) 26-7.

its *linguistic characteristics* alone.<sup>156</sup> The positivist analysis ignores the rich and concrete historical context in which law *develops*, and it ignores the social context in which law *operates*. Legal positivism commits the philosophical fallacy by regarding its narrow linguistic analysis as a complete, final, and sufficient analysis of the nature of law.

### 3. Legal Positivism Separates Law from its Application

Second, positivist methodology separates law from its application.<sup>157</sup> Legal positivism concludes from its linguistic analysis that the pedigree of a law's creation is adequate to determine its validity. Legal positivism therefore ignores the substantive content of law.<sup>158</sup> As a result, legal positivism erroneously fails to consider the consequences of applying morally iniquitous laws. It accepts the validity of any law, however repugnant, so long as its pedigree of creation satisfies positivism's minimal requirements.

### 4. Legal Positivism Produces an Incomplete Description of Law

In addition to accepting morally iniquitous laws, these methodological shortcomings produce an incomplete description of law. Legal positivism maintains that legal systems are unions of primary and secondary rules.<sup>159</sup> As Dworkin demonstrates, however, lawyers and

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<sup>156</sup> Hart focuses on “a purely analytical study of legal concepts, a study of the meaning of the distinctive vocabulary of the law.” H. L. A. Hart, “Positivism and the Separation of Law and Morals,” *Harv. L. Rev.* 71 (4) (1958): 593–629, 601.

<sup>157</sup> John Dewey, “My Philosophy of Law,” *The Great Legal Philosophers*, ed. Clarence Morris (Philadelphia: U Penn P, 1959) 508. “Without application,” Dewey writes, “there are scraps of paper or voices in the air but nothing that can be called law.” Dewey continues: “Application is not something that happens after a rule or law or statute is laid down but is a necessary part of them; such a necessary part indeed that in given cases we can judge what the law is as matter of fact only by telling how it operates and what are its effects in and upon the human activities that are going on.”

<sup>158</sup> Ronald M. Dworkin, “The Model of Rules,” 35 (1) *Chi. L. Rev.* (1967): 14-46, 17.

<sup>159</sup> H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Clarendon, 1994) 77-99, 117, 213, 249-250.

judges evaluate hard cases by applying standards that do not fit the positivist definition of rules. Law thus includes *principles* as well as *rules*.<sup>160</sup>

### C. Selecting A New Philosophical Method

The second step in formulating a pragmatic standard of legal validity is selecting a philosophical method that overcomes the inadequacies of natural law and legal positivism. This method must recognize, as Holmes did, that the life of the law is experience, not logic. Laws are determined less by logic than by the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, and the prejudices that judges share with their fellow man. We cannot treat law as if it contained only the axioms and corollaries of a book of mathematics.<sup>161</sup>

This dissertation therefore adopts a methodology, adapted from the philosophy of John Dewey, that evaluates legal principles by applying the experimental method to the effects and social consequences those legal principles produce. This evaluation of legal principles focuses on the operations of law and the effects of these operations upon ongoing human activities.<sup>162</sup>

History is an essential feature of this method. History informs us of the effects and social consequences that legal principles produce and the effect of their operation upon ongoing human activities. Legal history provides a long record of past experimentation with legal principles. In Dewey's terms, history provides punitive verifications that give some legal principles a well-

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<sup>160</sup> Ronald Dworkin, "The Model of Rules," *U. Chi. L. Rev.* 35 (1) (1967): 14-46, 23-24. Dworkin utilizes the case of *Riggs v. Palmer*, 115 N.Y. 506 (1889) to illustrate his distinction between *rules* and *principles*. In *Riggs*, the statutory *rule* governing the case allowed a murderer, Elmer Palmer, to inherit from his victim, his grandfather Francis Palmer. The court denied the inheritance, however, by applying the legal *principle* that no wrongdoer should benefit from his wrongdoing. This principle did not function as a primary or secondary legal rule.

<sup>161</sup> Oliver Wendell Holmes, Jr., *The Common Law* (Boston: Little Brown, 1881) 1.

<sup>162</sup> John Dewey, "My Philosophy of Law," *The Great Legal Philosophers*, ed. Clarence Morris (Philadelphia: University Of Pennsylvania Press, 1959) 508-10.

earned prestige and bring others into disrepute. “Lightly to disregard them is the height of foolishness.”<sup>163</sup>

This pragmatic methodology avoids the problems created by natural law's reliance on divine law and natural law's inconsistent views of human reason. It avoids the analytic fallacy committed by legal positivism in separating law from its historical and social contexts. It avoids the positivist separation of law from its application, and thus avoids the incomplete description of law offered by legal positivism.

#### **D. Evaluation of Legal Principles**

The final step in formulating a new standard of legal validity is the evaluation of legal principles. Chapter II explains how Locke and Blackstone adopt and expand on the principles of *autonomy* and *consent* that emerged from the English experience of the seventeenth century. Chapter II then explains how legal positivism abandons the principles of autonomy and consent. It does so by dissecting law from its historical and social context and by evaluating legal principles by “a purely analytical study of legal concepts, a study of the meaning of the distinctive vocabulary of the law.”<sup>164</sup> Lastly, Chapter II explains the process by which legal positivism is displacing natural law in American jurisprudence.

Chapters III, IV, and V evaluate the legal principles applied in three famous cases. Chapter III examines the Athenian legal system and the case of Socrates in 399 B.C. Chapter IV examines the Congregation of the Holy Office and the Galileo Affair of 1616 to 1632, and

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<sup>163</sup> John Dewey, *Human Nature and Conduct: An Introduction to Social Psychology* (New York: Random House, 1930) 221.

<sup>164</sup> H. L. A. Hart, “Positivism and the Separation of Law and Morals,” *Harv. L. Rev.* 71 (4) (1958): 593–629, 61: “We must remember that the Utilitarians combined with their insistence on the separation of law and morals two other equally famous but distinct doctrines. One was *the important truth that a purely analytical study of legal concepts, a study of the meaning of the distinctive vocabulary of the law*, was as vital to our understanding of the nature of law as historical or sociological studies...” [Emphasis added].

Chapter V examines the Soviet legal system and the “Moscow Trials” of Leon Trotsky from 1936 to 1938.

Although these trials cover a span of twenty-four centuries, they share a number of common characteristics. The courts convicted the defendants in each case despite their innocence of the charges against them. The underlying legal system in each case treated its defendants, not as ends in themselves, but as means to political ends. In each case, the legal system did so by disregarding the principles of reason, consent, and autonomy.

This dissertation therefore combines the principles of reason, autonomy, and consent to formulate a new standard for legal validity. Requiring laws to meet this standard of validity ensures that legal systems treat their subjects, not as means to other ends, but as ends in themselves.

Another principle emerges from this study that casts its shadow beyond the Philosophy of Law. Legal systems that treat their subjects as means to an end tend to operate unjustly and corrode the society they serve. Just laws alone cannot guarantee continuity, order, and justice in society. No constitution can enforce itself. Unjust legal systems, however, inevitably catalyze their subjects to revolt. The history of the Western legal tradition, therefore, is very much a history of revolutions.<sup>165</sup>

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<sup>165</sup> Berman, Harold J. *Law and Revolution: The Formation of the Western Legal Tradition*. Cambridge: Harvard UP, 1983; and Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge: Harvard UP, 2003). Berman explains that the Western legal tradition developed through six great revolutions: the *Papal Revolution of 1075-1122*, the *Protestant Reformation of 1517-1555*, the *English Revolution of 1640-1689*, the *American Revolution of 1775-1783*, the *French Revolution of 1789-1799*, and the *Russian Revolution of 1917*.

## CHAPTER II

### THE CONFLICT BETWEEN NATURAL LAW AND LEGAL POSITIVISM

This chapter presents the major tenets of natural law jurisprudence and legal positivism and explains the practical impact of their conflicts on American jurisprudence. This chapter contains three sections. The first section explains the major sources and tenets of the natural law tradition in American jurisprudence. The second section explains the major sources and tenets of the positivist tradition. The third section describes four factors facilitating the displacement of natural law jurisprudence by legal positivism.

#### I. The Natural Law Tradition in Jurisprudence

##### A. Three Types of Law

Although natural law theory evolves through the centuries, it consistently demonstrates the following characteristics. Natural law theory divides jurisprudence into three parts, natural law, positive law, and the law of nations.<sup>166</sup> Natural law originates in nature, and positive law originates in man.

Most legal provisions involve positive law, and these provisions are easily changed. Natural law, on the other hand, consists of a small number of immutable principles. These principles are discernible through reason and enjoy universal application. Justinian names three such principles, which Blackstone adopts.<sup>167</sup>

##### B. Justice as the Goal of Natural Law

The goal of natural law theory is the procurement of justice, usually defined as long-

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<sup>166</sup> For Blackstone, the “law of nations” or international law refers to the “mutual compacts, treaties, leagues, and agreements between” nation states. Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 25.

<sup>167</sup> The *Institutes* reduces natural law to three precepts or principles: “to live honestly, to injure no one, and to give every man his due.” *The Institutes of Justinian*, trans. J.B. Moyle, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1889) 2, 3. Blackstone expressly adopts these three precepts. Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 27.



term human happiness or eudaimonia in the Aristotelian sense.<sup>168</sup> Blackstone adopts the term “felicity.”<sup>169</sup> Adherence to the principles of natural law leads to justice and human happiness. Failing to adhere to the principles of natural law inevitably leads to injustice and unhappiness.

### C. The Validity of Positive Law

Natural law does not determine every legal issue. Natural law recognizes the validity of most provisions of positive law, and man is at liberty to adopt positive laws that benefit society.<sup>170</sup> If a provision of positive law violates a principle of natural law, however, then that provision is invalid. In the absence of such a violation, natural law is usually “indifferent” to provisions of positive law.

### D. The Standards of Autonomy and Consent

As explained in Chapter I, Locke and Blackstone adopt two standards that re-emerged in English jurisprudence from the constitutional struggles of the seventeenth century. Legal

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<sup>168</sup> Aristotle defines justice as lawfulness that is concerned with the common advantage and happiness of the political community. Aristotle, *Nicomachean Ethics* V.1.1129b 11–19, cf. *Politics* III.12.1282b 16–17. Aristotle writes that justice has two parts, natural justice and legal justice. Natural justice consists of principles of natural law that originate in nature, not in the minds of men “by people’s thinking this or that.” Natural law principles apply with equal force everywhere, “just as fire burns both here and in Persia.” Legal justice, on the other hand, consists of positive law. Positive law principles, such as the conventional measures for grain and wine, “are just not by nature but by human enactment” and “are not everywhere the same.” Aristotle, *Ethica Nicomachea*, trans. W.D. Ross, rev. ed. (New York: Oxford UP, 2009) 92.

<sup>169</sup> Blackstone holds God interwove justice and felicity so closely that neither is obtainable without the other. Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 27: “For [God] has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be attained but by observing the former; and, if the former be punctually obeyed, it cannot but induce the latter. In consequence of which mutual connexion of justice and human felicity, he has not perplexed the law of nature with a multitude of abstracted rules and precepts, referring merely to the fitness or unfitness of things, as some have vainly surmised, but has graciously reduced the rule of obedience to this one paternal precept, ‘that man should pursue his own true and substantial happiness.’”

<sup>170</sup> Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 28. “There are, it is true, a great number of indifferent points in which [natural law leaves] man at his own liberty, but which are found necessary, for the benefit of society, to be restrained within certain limits. And herein it is that human laws have their greatest force and efficacy; for, with regard to such points as are not indifferent, human laws are only declaratory of, and act in subordination to, [natural law].”

positivism rejects both these standards. This divide produces many of the conflicts in contemporary American jurisprudence.

The first standard is the requirement of autonomy of law, the supremacy of law over political rulers. The autonomy of law was an established principle of English jurisprudence by 1235.<sup>171</sup> As explained in Chapter I, however, the kings of the Stuart dynasty repudiated this principle.<sup>172</sup> Under the principle of autonomy, the ruler and the ruled must both be subject to the same laws, and laws are not subject to arbitrary change by political rulers.

The second standard is that all power derives its legitimacy from the consent of the governed. English law formally adopted the principle of consent in 1297. The statutes of Edward I provided that “the king shall not take any aids or tasks, but by the common assent of the realm.”<sup>173</sup> As explained in Chapter I, however, the kings of the Stuart dynasty repudiated this principle as well. For Locke, the consent of the governed is “absolutely necessary” for the legitimacy of law,<sup>174</sup> and the consent of the governed determines the legitimacy of

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<sup>171</sup> The earliest statement of the principle of autonomy appears in Henry de Bracton’s 1235 treatise on common law, *De Legibus et Consuetudinibus Angliae* (*On the Laws and Customs of England*), ed. George E. Woodbine, trans. Samuel E. Thorne, vol. 1 (Cambridge: Harvard UP, 1968) 33: “The king must not be under man but under God and under the law, because the law makes the king ... there is no king where the will and not the law has dominion.”

<sup>172</sup> See discussion of “Stuart Absolutism” at pages 9-10 of Chapter I, *supra*.

<sup>173</sup> Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 101: “For no subject of England can be constrained to pay any aids or taxes, even for the defence of the realm or the support of government, but such as are imposed by his own consent, or that of his representatives in parliament. By the statute 25 Edw. I. c. 5 and 6. it is provided, that the king shall not take any aids or tasks, but by the common assent of the realm. And what that common assent is, is more fully explained by 34 Edw. I. sf. 4. c. 1. which enacts, that no talliage or aid shall be taken without the assent of the archbishops, bishops, earls, barons, knights, burgesses, and other freemen of the land: and again by 14 Edw. III. st. 2, c. 1, the prelates, earls, barons, and commons, citizens, burgesses, and merchants, shall not be charged to make any aid, if it be not by the common assent of the great men and commons in parliament. And as this fundamental law had been shamefully evaded under many succeeding princes, by compulsive loans, and benevolences extorted without a real and voluntary consent, it was made an article in the petition of right.”

<sup>174</sup> John Locke, *The Second Treatise of Government and A Letter concerning Toleration* (Mineola: Dover Publications, 2002) 61.

government.<sup>175</sup> Blackstone agrees.<sup>176</sup>

Legal positivism rejects both of these standards. Law has no autonomy because positivism founds law on the will of the lawmaker.<sup>177</sup> Law possesses no supremacy over political rulers. The ruler and the ruled are not subject to the same rules. Different rules govern public officials than govern the rest of society, and public officials have the sole authority to determine legal validity.<sup>178</sup> Legal positivism also rejects the view that all power derives its legitimacy from the consent of the governed. The general population may be compelled to obey the law “from any motive whatsoever” and by any necessary sanction.<sup>179</sup> The consent of the governed is

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<sup>175</sup> John Locke, *The Second Treatise of Government and A Letter concerning Toleration* (Mineola, NY: Dover, 2002) 44. In sections 212-217, Locke states four ways by which governments are “dissolved from within,” each reflecting actions of the Stuart kings during the constitutional struggles of the seventeenth century. *Id.* at 96-99.

<sup>176</sup> Regarding consent and the legitimacy of government, Blackstone holds that “the king shall not take any aids or tasks, but by the common assent of the realm.” Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1840) 101. Regarding consent and the legitimacy of law, common law derives from long-standing and freely adopted custom, and such custom evidences universal consent. Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 21, 393. Acts of Parliament evidence consent because they derive from the consent of the legitimate representatives of the governed. Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1840) 33, 101.

<sup>177</sup> Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge: Harvard UP, 2003) 241.

<sup>178</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994), 79-99. Hart’s model of law depicts law as the union of primary and secondary social rules. Primary rules impose an obligation or duty on the general population, such as tort law and criminal statutes. Secondary rules confer powers to introduce, change, or modify a primary rule. Secondary rules confer *private* powers on the general population to establish or amend contracts, wills, trusts, etc. Secondary rules confer *public* powers on public officials to change, adjudicate, and determine the validity of legal duties and obligations for the general population. The paradigm rule is the secondary rule of recognition, which empowers public officials (only) to determine the validity of a law.

<sup>179</sup> John Austin’s “command theory” of positive law defines law as (a) commands, (b) backed by threat of sanctions, (c) from a sovereign, (d) to whom people have a habit of obedience. John Austin, *The Province of Jurisprudence Determined*, (Amherst, NY: Prometheus, 2000) 14, 225-31. H.L.A. Hart explains that there are only two conditions for the existence of a legal system. The first condition for a legal system is that private citizens generally obey the primary rules of obligation. It is sufficient that each member of the population obeys the primary rules “for his part only” and “*from any motive whatsoever.*” H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 116. The second condition is that public officials adopt the rule of recognition specifying the criteria for legal validity as their “public standard of official behavior.” H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 117.

irrelevant to the validity of law.

Legal positivism furthermore accepts “morally iniquitous” laws as legally valid,<sup>180</sup> even if they have “no moral justification or force whatsoever.”<sup>181</sup> The positivist acceptance of morally iniquitous laws not only permits a legal system that denies the natural law principles of reason, autonomy, and consent; it also permits a legal system where “anything goes” and *any* legal provision is potentially enforceable as valid.

### **E. Sources of the Natural Law Tradition**

The dominant source of natural law in American jurisprudence is Sir William Blackstone’s *Commentaries on the Common Law of England*.<sup>182</sup> Blackstone incorporates contributions from multiple sources, but three are particularly noteworthy. The first of these sources is the *Institutes of Justinian*,<sup>183</sup> written as a textbook for law schools in 535 A.D. The *Institutes* provides the fundamental precepts of natural law adopted by Blackstone from Roman law.<sup>184</sup>

A second source for Blackstone's jurisprudence is a series of English treatises on the

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<sup>180</sup> H.L.A. Hart resurrected the positivist claim that law has no necessary connection with morality on April 30, 1957, in the Oliver Wendell Holmes, Jr. lecture at Harvard Law School. His lecture is published as H. L. A. Hart, “Positivism and the Separation of Law and Morals,” *Harv. L. Rev.* 71 (4) (1958): 593–629. Hart gives the final statement of his positivist jurisprudence in H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Clarendon Press, 1994).

<sup>181</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 268: “I argue in this book that though there are many different contingent connections between law and morality there are no necessary conceptual connections between the content of law and morality; and hence morally iniquitous provisions may be valid as legal rules or principles. One aspect of this form of the separation of law from morality is that there can be legal rights and duties which have no moral justification or force whatever.”

<sup>182</sup> Sir William Blackstone, *Commentaries on the Laws of England*, 2 vols. (New York: W.E. Dean, 1840).

<sup>183</sup> Justinianus, Flavius Petrus Sabbatius, *The Institutes of Justinian*, trans. J.B. Moyle. 2<sup>nd</sup> ed. (Oxford: Clarendon, 1889).

<sup>184</sup> See, e.g., Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 2, 10, 13, 37, 39, 55, 56, 110, 190, 332.

common law, including those written by Ranulf de Glanvil in 1188,<sup>185</sup> Henry de Bracton *circa* 1235,<sup>186</sup> Sir John Fortescue *circa* 1470,<sup>187</sup> and Sir Matthew Hale in 1713.<sup>188</sup> These treatises provide an historical approach to law as well as the rules of common law based in ancient custom. Hale, the most influential of these authors, presents a formulation of law as a science founded on legal principles.

A third source for Blackstone's jurisprudence is the seventeenth century constitutional struggle described in Chapter I, including the works of John Locke. This struggle generated, *inter alia*, the re-emergence of the standards of autonomy and consent, and Blackstone interprets the common law to meet these standards.<sup>189</sup> Along with the *Institutes of Justinian*, Locke provides the model of natural law based on reason adopted by Blackstone. Both Locke and

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<sup>185</sup> Ranulf de Glanvil, *Tractatus de legibus et consuetudinibus regni Angliae* (*Treatise on the laws and customs of the Kingdom of England*), ed. John Rayner (London: White and Brooke, 1780). See, e.g., Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 61, 63, 66, 105, 128, 170, 175, 199, 231, 282, 412.

<sup>186</sup> Henry de Bracton, *Legibus et consuetudinibus regni Angliae* (*Laws and customs of the Kingdom of England*), ed. George E. Woodbine (New Haven: Yale U.P., 1915). See, e.g., Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 49, 55, 78, 84, 94, 123, 176, 180, 182, 217, 220, 223, 217, 255, 310, 316, 344, 412, 427, 430.

<sup>187</sup> Sir John Fortescue, *De laudibus legum Angliae* ("In Praise of the Laws of England, On the Laws and Governance of England"), trans. Andrew Amos (Cambridge: Butterworth, 1825). See, e.g., Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 9, 14, 21, 43, 46, 120, 171, 176, 180, 187, 256, 257, 381.

<sup>188</sup> Sir Matthew Hale, *The History of the Common Law of England*, ed. Charles M. Gray (Chicago: U. of Chicago P., 1971); Sir Matthew Hale, *The Analysis of the Law; Being a Scheme, or Abstract, of the several Titles and Partitions of the Law of England, Digested into Method* (London: Nutt and Gosling, 1739). See, e.g., Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 8, 51, 64, 76, 125, 172, 180, 189, 192, 208, 291, 323, 364, 365, and 430. In addition to these general treatises on the common law, two influential treatises on the common law of real property include Thomas Littleton, *Littleton's Tenures* (London: Hastings, 1846) first published *circa* 1481, and Sir Edward Coke, *The First Part of the Institutes of the Laws of England, or A Commentary on Littleton*, 3 vols. (Philadelphia: Johnson, 1812), written in 1648.

<sup>189</sup> In Michael Zuckert's view, Blackstone "is as much a social compact thinker as Hobbes or Locke," but Blackstone seeks to reinterpret the common law to meet the standard of consent. Michael Zuckert, "Social Compact, Common Law, and the American Amalgam: The Contribution of William Blackstone," *The American Founding and the Social Compact*, ed. Ronald J. Pestritto and Thomas G. West (Lanham, MD: Lexington Books, 2003), 56, 64.

Blackstone meticulously avoid any mention of Thomas Aquinas' theory of natural law.<sup>190</sup>

### 1. *The Institutes of Justinian*

The *Institutes of Justinian*<sup>191</sup> defines justice as “the set and constant purpose that gives

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<sup>190</sup> Locke and Blackstone are both antagonistic to Roman Catholicism, viewing Roman Catholics as disloyal and a threat to English security for recognizing the supremacy of a foreign prince. In *A Letter regarding Toleration*, Locke views Roman Catholics as bound by their faith to depose Protestant princes. John Locke, *The Second Treatise of Government and A Letter concerning Toleration* (Mineola: Dover Publications, 2002) 144. Aquinas' views on natural law are nevertheless historically and philosophically important outside of Anglophone jurisprudence. Aquinas describes four types of law in *Summa Theologiae*. William P. Baumgarth and Richard J. Regan, eds., *Saint Thomas Aquinas on Law, Morality, and Politics* (Indianapolis: Hackett 1988), 17-28. *Divine law* is the law that pertains to “our last end,” after divine judgment. *Eternal law* is the set of timeless truths that govern the movement and behavior of all things in the universe. *Natural law* is that part of eternal law that applies to man. “Natural law,” writes Aquinas, “is nothing else than the rational creature’s participation of the eternal law.” *Id.* at 20. *Human law* is law that “purports” to have a human source. Natural law derives from human nature, and human nature for Aquinas is free and rational. Aquinas emphasizes a single first precept in his theory of natural law. Since rational beings are naturally disposed to pursue the good, the first precept of natural law is to pursue what is good and avoid what is bad. All other precepts of natural law derive from this first precept. The general precepts of natural law, known to all men, “can nowise be blotted out from men’s hearts.” *Id.* at 55. Secondary precepts of natural law, however, can be blotted out from the human heart by “evil persuasions,” “vicious customs,” and “corrupt habits.” This is true, even though secondary precepts follow closely from general precepts. Aquinas offers such “evil, vicious, and corrupt” influences as the explanation for why “theft and even unnatural vices” are “not esteemed sinful” by some men. Aquinas concludes that such “blotting out” of secondary precepts explains why “some legislators have framed certain enactments which are unjust.” *Id.* at 55. To guard against unjust enactments, human laws must comply with natural law: “As Augustine says, ‘that which is not just seems to be no law at all;’ wherefore the force of a law depends on the extent of its justice. Now, in human affairs a thing is said to be just from being right according to the rule of reason. But the first rule of reason is the law of nature, as is clear from what has been stated above. Consequently, every human law has just so much of the nature of law as it is derived from the law of nature. But if, in any point, it deflects from the law of nature, it is no longer a law but a perversion of law.” *Id.* at 55. [Emphasis added]. In Thomist doctrine, eternal law is a rational principle that guides both God and man. Natural law consists of principles of practical reason. These principles direct human beings to maintain their existence and to achieve their natural perfection as rational beings capable of contemplating God. Blackstone agrees with Thomas that God also abides by natural law. Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 27, but Duns Scotus and William of Ockham challenged Thomas on this point in the fourteenth century. John Duns Scotus, *Duns Scotus on the Will and Morality*, ed. Allan Wolter (Washington, DC: Catholic University of America Press, 1997); William of Ockham, *Opera Theologica*, 10 vols. (St. Bonaventure, N.Y.: Franciscan Institute Press, 1967-1986) vol. V, pp. 352-53. Scotus and Ockham argued the Thomist view erroneously limits God’s omnipotence. They argued instead that natural law binds only human beings, not God, and further that natural law binds human beings as the consequence of God’s will. J.B. Schneewind, “Locke’s Moral Philosophy,” *The Cambridge Companion to Locke* (Cambridge: Cambridge UP, 1994) 299-225.

<sup>191</sup> Justinian ordered the production of the *Corpus Juris Civilis* or “body of civil law,” and the *Corpus* consisted of three works. The *Institutes*, issued in 535, served as a legal textbook for law schools. It includes extracts from two other works, the *Codex Justinianus*, issued in 529, and the *Digest*, issued in 533. All three works enjoyed the full force of law. The *Codex* compiled all of the extant imperial

to every man his due.”<sup>192</sup> “Jurisprudence is the knowledge of things divine and human, the science of the just and the unjust.”<sup>193</sup> Roman law recognizes the distinction between natural law and positive law and divides law into three types, the *jus civile*, the *jus naturale*, and the *jus gentium*. The *jus civile* is “civil” or positive law and consists of “those rules which a state enacts for its own members.” The civil law of a state is “peculiar to itself.”<sup>194</sup> The *jus naturale* or law of nature “is that which she has taught all animals; a law not peculiar to the human race, but shared by all living creatures, whether denizens of the air, the dry land, or the sea.”<sup>195</sup> The *jus gentium* is the “law of nations,” or those laws “common to the whole human race.”<sup>196</sup>

The *Institutes* reduces natural law to three precepts or principles: “to live honestly, to injure no one, and to give every man his due.”<sup>197</sup> These principles of natural law are

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constitutions from the time of Hadrian, and the *Digest* compiled the writings of great Roman jurists such as Ulpian along with current edicts. Although Justinian originally intended the *Codex* to serve as the sole legal authority in the empire, he found that new laws were necessary, and the *Novellae Constitutiones* or “new laws” became the fourth part of the *Corpus*. The *Corpus* was lost in the eighth century but recovered circa 1070 in Italy. The *Corpus* provided the foundation for the development of law in civil code countries, and its three precepts of natural law still influence common law jurisdictions through Blackstone. See S. P. Scott, trans., *Corpus Juris Civilis, The Civil Law*, 17 vols. (Cincinnati: Central Trust, 1932).

<sup>192</sup> *The Institutes of Justinian*, trans. J.B. Moyle, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1889) 3.

<sup>193</sup> *The Institutes of Justinian*, trans. J.B. Moyle, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1889) 3.

<sup>194</sup> *The Institutes of Justinian*, trans. J.B. Moyle, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1889) 4: “Those rules which a state enacts for its own members are peculiar to itself, and are called civil law.”

<sup>195</sup> *The Institutes of Justinian*, trans. J.B. Moyle, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1889) 4: “Hence comes the union of male and female, which we call marriage; hence the procreation and rearing of children, for this is a law in the knowledge of which we see even the lower animals taking pleasure.”

<sup>196</sup> Unlike the *jus civile* or civil law, which is unique to the originating state, “The law of nations is common to the whole human race; for nations have settled certain things for themselves as occasion and the necessities of human life required. For instance, wars arose, and then followed captivity and slavery, which are contrary to the law of nature; for by the law of nature all men from the beginning were born free.” *The Institutes of Justinian*, trans. J.B. Moyle, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1889) 4. Since the focus of this dissertation is restricted to natural law and positive law, this dissertation omits further discussion of the law of nations.

<sup>197</sup> *The Institutes of Justinian*, trans. J.B. Moyle, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1889) 2, 3. Blackstone expressly adopts these three precepts. Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 27: “Such, among others, are these principles : that we should live

“established” by “divine providence,” and they are permanent and unchanging.<sup>198</sup> Positive laws, on the other hand, change frequently.<sup>199</sup>

## 2. English Treatises on Common Law

Blackstone's *Commentaries* rely on six centuries of common law treatises, and four authors are particularly influential in Blackstone's jurisprudence. The first is Ranulf de Glanvil. Glanvil served as Henry II's chief minister and assisted in accomplishing Henry's celebrated judicial reforms. Glanvil's *Tractatus de legibus et consuetudinibus regni Angliae* (*Treatise on the laws and customs of the Kingdom of England*)<sup>200</sup> is the earliest treatise on English law. Written in 1188 and first printed in 1554, Glanvil's *Tractatus* codified a systematic legal process and system of writs, innovations still utilized today.

The second influential author is Henry de Bracton. Bracton was an English jurist who lived *circa* 1210-1268. Scholars call Bracton, a contemporary of the Magna Carta of 1215, the “Blackstone of the thirteenth century” for his treatise *Legibus et consuetudinibus regni Angliae* (*Laws and customs of the Kingdom of England*),<sup>201</sup> written *circa* 1235. Bracton's *Legibus* contributes the earliest statement in English jurisprudence regarding the autonomy of law and its supremacy over political rulers. “The king must not be under man but under God and under the law, because the law makes the king ... there is no king where the will and not the law has

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honestly, should hurt nobody, and should render to every one his due; to which three general precepts Justinian has reduced the whole doctrine of law.”

<sup>198</sup> *The Institutes of Justinian*, trans. J.B. Moyle, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1889) 6. “But the laws of nature, which are observed by all nations alike, are established, as it were, by divine providence, and remain ever fixed and immutable.”

<sup>199</sup> *The Institutes of Justinian*, trans. J.B. Moyle, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1889) 6. The positive laws “of each individual state are subject to frequent change, either by the tacit consent of the people, or by the subsequent enactment of another statute.”

<sup>200</sup> Ranulf de Glanvil, *Tractatus de legibus et consuetudinibus regni Angliae* (*Treatise on the laws and customs of the Kingdom of England*), ed. John Rayner (London: White and Brooke, 1780).

<sup>201</sup> Henry de Bracton, *Legibus et consuetudinibus regni Angliae* (*Laws and customs of the Kingdom of England*), ed. George E. Woodbine (New Haven: Yale U.P., 1915).



dominion.”<sup>202</sup>

In a famous colloquy on November 10, 1608, between King James I and Sir Edward Coke, Coke cited the Latin version of Bracton's maxim “Rex non debet esse sub homine sed sub deo et sub lege, quia lex fecit regem” to James I. The king was highly offended and declared the ancient maxim treasonous.<sup>203</sup> James I eventually dismissed Coke as Chief Justice of the King's Bench in 1616 after Coke authored a series of decisions from 1610-1616 asserting the supremacy of the common law courts over the courts of the royal prerogative.<sup>204</sup>

The third noteworthy treatise is Sir John Fortescue's *De laudibus legum Angliae* (*In Praise of the Laws of England*),<sup>205</sup> circa 1470, a fictitious dialogue between a young exiled English prince and his Chancellor. Fortescue traces the foundation of common law to immemorial custom dating back to pre-Roman times.<sup>206</sup> Blackstone holds that law based on such

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<sup>202</sup> “Rex non debet esse sub homine sed sub deo et sub lege, quia lex fecit regem.” Henry de Bracton, *De Legibus et Consuetudinibus Angliae* (*On the Laws and Customs of England*), ed. George E. Woodbine, trans. Samuel E. Thorne, vol. 1 (Cambridge: Harvard UP, 1968) 33. De Bracton wrote his treatise *De Legibus et Consuetudinibus Angliae* circa 1235, a mere two generations after the Conquest. As de Bracton states, “But the king himself ought not to be subject to man, but subject to God and to the law, for the law makes the king. Let the king, then, attribute to the law what the law attributes to him, namely dominion and power, for there is no king where the will and not the law has dominion; and that he ought to be under the law, since he is the vicar of God, appears evidently after the likeness of Jesus Christ, whose place he fills on earth; for the true mercy of God, when many things were at his command to restore the human race in an ineffable manner, chose this way in preference to all others, as if to destroy the work of the devil he should use not the vigor of his power, but the reason of his justice, and so he was willing to be under the law, that he might redeem those who were under the law, for he was not willing to use his strength, but his reason and judgment.” *Id.*

<sup>203</sup> Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge: Harvard UP, 2003) 242, 464 n.35.

<sup>204</sup> Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge: Harvard UP, 2003) 214-15. James I removed Coke after a dramatic personal confrontation on November 14, 1616. The precipitating conflict involved the issue of the autonomy of the common law. Coke asserted that the King did not have authority to limit the common law courts' competence to determine their own competence. After James I removed Coke from his seat as Chief Justice, Coke entered Parliament and became the leader of the opposition. *Id.* at 214.

<sup>205</sup> Sir John Fortescue, *De laudibus legum Angliae* (*In Praise of the Laws of England*), trans. Andrew Amos (Cambridge: Butterworth, 1825).

<sup>206</sup> Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge: Harvard UP, 2003) 231-32.

custom evidences universal consent.<sup>207</sup>

Fortescue holds that statutes contrary to natural law are void,<sup>208</sup> and Fortescue is the earliest English writer to emphasize due process for defendants in criminal proceedings. Fortescue was a harsh critic of the procedures used by the Inquisition,<sup>209</sup> and he gives the first statement of the principle known as “Blackstone’s Theorem” in arguing against the use of torture to extract confessions. “*Indeed, one would much rather that twenty guilty persons should escape the punishment of death, than that one innocent person should be condemned, and suffer capitally.*”<sup>210</sup>

The fourth author, and the author whose influence on Blackstone was most profound, is Sir Matthew Hale, 1609-1676. Hale was a lawyer and jurist famous for his integrity. Although Hale lived during the most turbulent periods of the constitutional struggle of the seventeenth century, both Crown and Parliament respected Hale for his incorruptible character and

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<sup>207</sup> Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 21, 393.

<sup>208</sup> Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge: Harvard UP, 2003) 461 n. 3.

<sup>209</sup> Sir John Fortescue, *De laudibus legum Angliae* (In Praise of the Laws of England), trans. Andrew Amos (Cambridge: Butterworth, 1825) 100: “That man cannot in any wise be safe either in his life or property, whom his adversary (in many cases which may happen) will have it in his power to convict out of the mouth of *two* witnesses, such as are *unknown*, produced in court and pitched upon by the prosecutor. And, though in consequence of their evidence, he be not punished with death, yet an acquittal will not leave him in a much better condition after *the question* has been put, which cannot but affect the party with a contraction of his sinews and limbs, attended with constant disorders and want of health. A man, who lives under such a government, as you describe, lives exposed to frequent hazards of this sort: enemies are designing and desperately wicked.”

<sup>210</sup> Sir John Fortescue, *De laudibus legum Angliae* (In Praise of the Laws of England), trans. Andrew Amos (Cambridge: Butterworth, 1825) 93: “*Indeed, one would much rather that twenty guilty persons should escape the punishment of death, than that one innocent person should be condemned, and suffer capitally.* Neither can there be any room for suspicion, that in such a course and method of proceeding, a guilty person can escape the punishment due to his crimes; such a man's life and conversation would be restraint and terror sufficient to those who should have any inclination to acquit him : in a prosecution, carried on in this manner, there is nothing cruel, nothing inhuman; an innocent person cannot suffer in life or limb: he has no reason to dread the prejudices or calumny of his enemies, he will not, cannot, be put to the rack, to gratify their will and pleasure. In such a Constitution, under such laws, every man may live safely and securely.” [Emphasis in original].

impartiality. Hale represented leading royalists tried for treason in the 1640s and 1650s, yet interceded for Puritans charged with treason under Charles II in the 1660s. He served as a judge of the Court of Common Pleas under Cromwell, yet also served as Chief Justice of the Court of the King's Bench under Charles II.

Hale's ability to maintain political neutrality throughout an era of revolution and civil war reflects his allegiance to the common law. Political regimes came and went, but the common law abided without interruption.<sup>211</sup> Hale's *History of the Common Law*<sup>212</sup> was the first attempt to give a comprehensive portrayal of the historical origins and growth of English law. It remained the standard book on early English legal history until the late 19th century. Hale's *The Analysis of the Law*<sup>213</sup> presented the English common law as a coherent system.

Hale believed that natural law constitutes a distinct and binding body of law.<sup>214</sup> Harvard law professor Harold J. Berman writes that Hale's legal philosophy “represents the philosophy which dominated English legal thought in the late 17th, 18th, and early 19th centuries.” This philosophy “still plays an important part in the intellectual outlook of many, if not most, English (and American) practicing lawyers and judges, though not - any longer - of many English (or American) writers on legal philosophy.”<sup>215</sup>

Hale influenced Blackstone in three significant ways. First, Hale's treatises influenced

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<sup>211</sup> Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge: Harvard UP, 2003) 248-51.

<sup>212</sup> Sir Matthew Hale, *The History of the Common Law of England*, ed. Charles M. Gray (Chicago: U. of Chicago P., 1971).

<sup>213</sup> Sir Matthew Hale, *The Analysis of the Law; Being a Scheme, or Abstract, of the several Titles and Partitions of the Law of England, Digested into Method* (London: Nutt and Gosling, 1739).

<sup>214</sup> Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge: Harvard UP, 2003) 271.

<sup>215</sup> Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge: Harvard UP, 2003) 251.

Blackstone by presenting law as a science.<sup>216</sup> This was a new approach to law that emerged from the constitutional struggles of the seventeenth century.<sup>217</sup> Hale inspired Blackstone to present law “not only as a matter of practice but as a rational science,” grounded on “general principles” inherent in the law itself. It is the task of a legal scholar to discern those principles.<sup>218</sup>

Second, Hale's treatises influenced Blackstone by championing the (then) revolutionary doctrine of legal precedent.<sup>219</sup> For Hale, a line of judicial decisions that consistently applied a legal principle to various analogous fact situations was “evidence” of the existence and validity of such a principle. Previous decisions evidenced the approval of the principle by the judiciary. The prior decisions were thus a source of principles that possessed the force to bind subsequent courts.<sup>220</sup>

Third, Hale's treatises originated one of Blackstone's signature doctrines, the “declaratory theory” of law. The role of judges was not to “make” law, but rather to “find” law in the received legal tradition and “declare them.” This “declaratory theory” of law viewed

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<sup>216</sup> For a discussion of Blackstone's reliance on Hale's *The Analysis of Law*, which Blackstone acknowledged as “the most natural and scientific... as well as the most comprehensive” of “all the schemes hitherto made public for digesting the laws of England,” see Alan Watson, “The Structure of Blackstone's Commentaries,” Yale L. J. 97 (5) (1988): 795–821.

<sup>217</sup> Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge: Harvard UP, 2003) 297.

<sup>218</sup> Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 2: “But, when law is to be considered not only as a matter of practice, but also as a rational science, it cannot be improper or useless to examine more deeply the rudiments and grounds of these positive constitutions of society.” Cf. Daniel J. Boorstin, *The Mysterious Science of the Law: An Essay on Blackstone's Commentaries* (Boston: Beacon, 1958) 20 in which Boorstin characterizes Blackstone's conception of English legal science as “Everywhere in English law 'principles' were waiting to be found.”

<sup>219</sup> Chief Justice Vaughan made the earliest attempt to distinguish a case holding from the mere obiter dictum of the judge in the Court of Common Pleas in 1673. “An opinion given in court, if not necessary to the judgment, ... is no more than a gratis dictum.” *Bole v. Norton* (1673), Vaughan Reports 382.

<sup>220</sup> Sir Matthew Hale, *The History of the Common Law of England*, ed. Charles M. Gray (Chicago: U. of Chicago P., 1971) 45: “The decisions of courts of justice... do not make the law properly so-called (for that only the King and Parliament can do); yet they have a great weight and authority in expounding, declaring, and publishing what the law of this kingdom is, especially when such decisions hold a consonancy and congruity with resolutions and decisions of former times, and though such decisions are less than the law, yet they are a greater evidence there of in the opinion of any private persons, as such, whatsoever.”

*precedent* as a source of law, and was highly analogous to the common law's view of *custom* as a source of law. Both precedent and custom were in turn subject to a requirement of “reasonableness,” which permitted unreasonable precedents or customs to be set aside when necessary.<sup>221</sup> The prohibition against judges making new law is a fundamental source of the contemporary conflict between natural law jurisprudence and legal positivism.

### **3. John Locke and the Constitutional Struggle of 1603-1701**

A third source for Blackstone's jurisprudence is the seventeenth century constitutional struggle described in Chapter I, including the works of John Locke. The English constitutional struggle continues to exert a profound influence on American legal and political culture, and the philosophy of John Locke is an important vehicle of this influence.<sup>222</sup> Locke's influence shapes Blackstone's formulation of natural law in the *Commentaries*. Blackstone and Locke share common views regarding the role of reason in natural law, the validity requirements for positive law, the principle of autonomy, and the principle of consent.

#### **a. Locke and Natural Law**

Locke's work emphasizes the epistemological and political aspects of natural law. Locke rejects the view that knowledge of natural law is innately “inscribed in the minds of men.”<sup>223</sup> Instead, man discovers the precepts of natural law by applying his reason. Reason teaches natural

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<sup>221</sup> Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge: Harvard UP, 2003) 274-75.

<sup>222</sup> Nozick documents the importance of Lockean liberal theory on American institutions in Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974) and John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971). Thomas Jefferson described Locke's *Second Treatise*, Locke's “little book on government,” as “perfect.” Morton White, *Philosophy, The Federalist, and The Constitution* (New York: Oxford University Press, 1987), 3.

<sup>223</sup> John Locke, *Essays on the Law of Nature*, ed. W. von Leyden (Oxford: Clarendon Press, 1988). Locke's epistemology famously attacks innate knowledge in Book I of Locke's *Essay*. John Locke, *An Essay concerning Human Understanding*, ed. Kenneth P. Winkler (Indianapolis: Hackett Publishing, 1996) 4-32.

law to “all mankind, who will but consult it.”<sup>224</sup> Locke describes “the pursuit of happiness” as “our greatest good,” and stresses the “necessity of ...pursuing true happiness” as “the foundation of our liberty.”<sup>225</sup>

Natural law dominates Locke's political philosophy.<sup>226</sup> Locke rejects Hobbes' description of the state of nature as a war of all against all in which life is “solitary, poor, nasty, brutish, and short.”<sup>227</sup> Although Locke's state of nature possesses “inconveniences” that ultimately motivate men to form societies,<sup>228</sup> the state of nature is generally peaceable and governed by a single precept of natural law. “The state of nature has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions.”<sup>229</sup>

#### **b. Locke and Legal Validity**

Positive laws that violate natural law precepts are not valid. Natural law provides inalienable rights to “life, health, liberty, and possessions” that exist prior to and independent of society.<sup>230</sup> Human beings, however, pass corrupt laws in the form of “intricate contrivances of

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<sup>224</sup> John Locke, *The Second Treatise of Government and A Letter concerning Toleration* (Mineola: Dover Publications, 2002) 3.

<sup>225</sup> John Locke, *An Essay concerning Human Understanding*, ed. Kenneth P. Winkler (Indianapolis: Hackett Publishing, 1996) 108.

<sup>226</sup> See John Yolton, “Locke on the Law of Nature,” *Philosophical Review* 67 (1957): 477-498.

<sup>227</sup> Thomas Hobbes, *Leviathan*, ed. Edwin Curley (Indianapolis: Hackett Publishing, 1994) 74.

<sup>228</sup> These inconveniences center on violations of another's natural rights, and include the lack of adequate agencies for finding facts, for rendering impartial judgments in disputes, and for imposing just punishments. “I easily grant,” writes Locke, “that civil government is the proper remedy for the inconveniences of the state of nature.” John Locke, *The Second Treatise of Government and A Letter concerning Toleration* (Mineola: Dover Publications, 2002) 4-6.

<sup>229</sup> John Locke, *The Second Treatise of Government and A Letter concerning Toleration* (Mineola: Dover Publications, 2002) 3.

<sup>230</sup> The concept of inalienable natural rights is also the point of attack for Bentham's legal positivism. See text at page 13, *infra*.

men following contrary and hidden interests.”<sup>231</sup> To protect against such laws, Locke holds that human laws are “only so far right, as they are founded on the law of nature.”<sup>232</sup>

### c. Locke and the Principle of Autonomy

Locke adopts the principles of autonomy and consent. Law is the “great instrument and means” of achieving the “great end of men's entering into society,” “the enjoyment of their property in peace and safety.”<sup>233</sup> For law to achieve this great end, law must be autonomous and wield supremacy over political rulers. “Wherever law ends tyranny begins,” writes Locke. “And whosoever in authority exceeds the power given him by the law and makes use of the force he has under his command to compass that upon the subject which the law allows not... may be opposed as any other man who by force invades the right of another.”<sup>234</sup>

Locke gives four examples of lawless tyranny that “dissolve governments from within.”<sup>235</sup> Each example reflects an actual abuse of power by the Stuart kings set out in Chapter I. Locke holds that when each type of tyranny occurs, “the people are at liberty to provide for themselves by erecting a new legislative, different from the other, by the change of persons, or

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<sup>231</sup> John Locke, *The Second Treatise of Government and A Letter concerning Toleration* (Mineola: Dover Publications, 2002) 6: “For though it would be beside my present purpose to enter here into the particulars of the law of Nature, or its measures of punishment; yet it is certain there is such a law, and that too as intelligible and plain to a rational creature and a studier of that law as the positive laws of commonwealths, nay, possibly plainer; as much as reason is easier to be understood than the fancies and intricate contrivances of men, following contrary and hidden interests put into words; for truly so are a great part of the municipal laws of countries, which are only so far right as they are founded on the law of Nature, by which they are to be regulated and interpreted.”

<sup>232</sup> John Locke, *The Second Treatise of Government and A Letter concerning Toleration* (Mineola: Dover Publications, 2002) 6. “[T]he positive laws of commonwealths [are understood as] the fancies and intricate contrivances of men, following contrary and hidden interests put into words; for so truly are a great part of the municipal laws of countries, which are only so far right, as they are founded on the law of nature, by which they are to be regulated and interpreted.”

<sup>233</sup> John Locke, *The Second Treatise of Government and A Letter concerning Toleration* (Mineola: Dover Publications, 2002) 60-61.

<sup>234</sup> John Locke, *The Second Treatise of Government and A Letter concerning Toleration* (Mineola: Dover Publications, 2002) 92.

<sup>235</sup> John Locke, *The Second Treatise of Government and A Letter concerning Toleration* (Mineola: Dover Publications, 2002) 97-99.

form, or both, as they shall find it most for their safety and good.”<sup>236</sup> These examples include the prince’s replacing the laws with his will;<sup>237</sup> hindering the free assembly of parliament;<sup>238</sup> altering parliamentary elections;<sup>239</sup> and subjecting the people to a foreign power.<sup>240</sup>

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<sup>236</sup> John Locke, *The Second Treatise of Government and A Letter concerning Toleration* (Mineola: Dover Publications, 2002) 99. Locke continues: “For the society can never, by the fault of another, lose the native and original right it has to preserve itself, which can only be done by a settled legislative, and a fair and impartial execution of the laws made by it.” *Id.*

<sup>237</sup> John Locke, *The Second Treatise of Government and A Letter concerning Toleration* (Mineola: Dover Publications, 2002) 97: “214. First, that when such a single person or prince sets up his own arbitrary will in place of the laws which are the will of the society declared by the legislative, then the legislative is changed. For that being, in effect, the legislative whose rules and laws are put in execution, and required to be obeyed when other laws are set up, and other rules pretended and enforced than what the legislative, constituted by the society, have enacted, it is plain that the legislative is changed. Whoever introduces new laws, not being thereunto authorized, by the fundamental appointment of the society, or subverts the old, disowns and overturns the power by which they were made, and so sets up a new legislative.” James I levied impositions of tunnage and poundage in 1606 without parliamentary consent as required by law. Charles I levied forced loans beginning in 1626, distraint of knighthood beginning in 1630, inland ship money during peacetime beginning in 1634, and forest fines beginning in 1635, all without parliamentary consent as required by law. Charles I’s “personal rule” without Parliament spanned eleven years from 1629 to 1640. Charles II in 1672 and James II in 1688 attempted to use their “dispensing power” to disregard more than forty laws regulating religion.

<sup>238</sup> John Locke, *The Second Treatise of Government and A Letter concerning Toleration* (Mineola: Dover Publications, 2002) 98: “215. Secondly, when the prince hinders the legislative from assembling in its due time, or from acting freely, pursuant to those ends for which it was constituted, the legislative is altered. For it is not a certain number of men—no, nor their meeting, unless they have also freedom of debating and leisure of perfecting what is for the good of the society wherein the legislative consists; when these are taken away, or altered, so as to deprive the society of the due exercise of their power, the legislative is truly altered. For it is not names that constitute governments, but the use and exercise of those powers that were intended to accompany them; so that he who takes away the freedom, or hinders the acting of the legislative in its due seasons, in effect takes away the legislative, and puts an end to the government.” Each of the four Stuart Kings repeatedly prorogued and dissolved Parliament for these ends, and Charles I and James II both attempted two “personal rules” by prohibiting Parliament from assembling, Charles from 1629 to 1640, and James from 1685 until the end of his reign in 1688. Both attempts resulted in revolution. In 1621, James I imprisoned Sir Edward Coke and two other members of Parliament in the Tower for drafting Parliament’s “Protestation” against the king. James I attempted to forbid Parliament from discussing his impositions in 1610, imprisoning members who did so in the Tower. In 1629, Charles I arrested nine members who criticized his fiscal and religious policies during sessions of Parliament. In 1642, Charles I attempted a coup d’état of Parliament to arrest five more, provoking the English civil war. Charles II also arrested members of Parliament who opposed his policies. Locke’s patron, the Earl of Shaftesbury, was arrested, charged with treason, and tried for his life in 1681 by Charles II, all in retaliation for Shaftesbury’s introducing the Exclusion Bill in Parliament in 1680. Locke was writing his *Two Treatises on Civil Government* during this period. Peter Laslett, “The English Revolution and Locke’s ‘Two Treatises of Government,’” *Cambridge Historical J.* 12 (1) (1956): 40–55. The fear of further arrests forced Shaftesbury and Locke to flee England.

<sup>239</sup> John Locke, *The Second Treatise of Government and A Letter concerning Toleration* (Mineola: Dover Publications, 2002) 98: “216. Thirdly, when, by the arbitrary power of the prince, the electors or ways of



#### d. Locke and the Principle of Consent

All legitimate political power for Locke originates solely in the consent of the governed to entrust their “lives, liberties, and possessions” to the oversight of the community as a whole, as expressed in the majority of its legislative body.<sup>241</sup> “Men being, as has been said, by nature all free, equal, and independent, no one can be put out of this estate, and subjected to the political power of another, without his own *consent*.”<sup>242</sup>

If the government unduly interferes with the property interests of its citizens, then the

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election are altered without the consent and contrary to the common interest of the people, there also the legislative is altered. For if others than those whom the society hath authorized thereunto do choose, or in another way than what the society hath prescribed, those chosen are not the legislative appointed by the people.” Charles I attempted to remove his political opponents from Parliament in 1626 by “fixing” the elections. Charles I made many of his opponents sheriffs of their counties, requiring them to remain at home and precluding their sitting in Parliament. Charles I also raised other opponents to the aristocracy, preventing their sitting in the House of Commons.

<sup>240</sup> John Locke, *The Second Treatise of Government and A Letter concerning Toleration* (Mineola: Dover Publications, 2002) 98: “217. Fourthly, the delivery also of the people into the subjection of a foreign power, either by the prince or by the legislative, is certainly a change of the legislative, and so a dissolution of the government. For the end why people entered into society being to be preserved one entire, free, independent society, to be governed by its own laws, this is lost whenever they are given up into the power of another.” In the “Danby Affair” of 1678, Charles II formulated his foreign policy to support French policies in exchange for a bribe of £200,000 a year for three years. Locke considered the use of the “dispensing power” by Charles II in 1672 and James II in 1688 to permit Roman Catholics to hold civil, teaching, and military offices as a delivery of the people to the subjection of a foreign power in the person of the Pope. He viewed James II’s establishment of an illegal standing army under Roman Catholic command from 1685 to 1688 in the same light. In *A Letter regarding Toleration*, Locke views Roman Catholics as bound by their faith to depose Protestant princes. John Locke, *The Second Treatise of Government and A Letter concerning Toleration* (Mineola: Dover Publications, 2002) 144: “What can be the meaning of their asserting that kings excommunicated or forfeit their crowns and kingdoms? It is evident that they thereby arrogate unto themselves the power of deposing kings, because they challenge the power of excommunication, as the peculiar right of their hierarchy.” Locke thus argues that Roman Catholics do not deserve toleration. *Id.* at 145: “That church can have no right to be tolerated by the magistrate which is constituted upon such a bottom that all those who enter into it do thereby *ipso facto* deliver themselves up to the protection and service of another prince. For by this means the magistrate would give way to the settling of a foreign jurisdiction in his own country, and suffer his own people to be listed, as it were, for soldiers against his own government.”

<sup>241</sup> John Locke, *The Second Treatise of Government and A Letter concerning Toleration* (Mineola: Dover Publications, 2002) 79.

<sup>242</sup> John Locke, *The Second Treatise of Government and A Letter concerning Toleration* (Mineola: Dover Publications, 2002) 44. [Emphasis added]. Locke continues: “The only way whereby anyone divests himself of his natural liberty and puts on the bonds of civil society is by agreeing with other men to join and unite into a community for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any that are not of it.”

citizens are bound to protect themselves by withdrawing their consent.<sup>243</sup> When misgovernment includes a “long train of abuses, prevarications, and artifices,” then the government itself is in rebellion against the people.<sup>244</sup> Only the people can decide if this has occurred, for the very existence of the civil order depends upon their consent.<sup>245</sup> The people have the right in such instances either to erect a new form of government or to place the old form of government “in new hands, as they think good.”<sup>246</sup>

The consent of the governed is also “absolutely necessary” for the legitimacy of law. Without the sanction of a legislature “which the public has chosen and appointed,” “the law could not have that which is *absolutely necessary* to its being a law, the *consent* of the society, over whom nobody can have a power to make laws but by their own consent, and by authority received from them.”<sup>247</sup>

## **F. Blackstone’s *Commentaries on the Laws of England***

### **1. Blackstone’s Formulation of Natural Law**

“Law,” writes Blackstone, “signifies a rule of action; and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational.”<sup>248</sup> Man is governed by immutable laws of human nature.<sup>249</sup> These laws are discernible by reason,<sup>250</sup> and man’s

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<sup>243</sup> John Locke, *The Second Treatise of Government and A Letter concerning Toleration* (Mineola: Dover Publications, 2002) 100-101.

<sup>244</sup> John Locke, *The Second Treatise of Government and A Letter concerning Toleration* (Mineola: Dover Publications, 2002) 102-103.

<sup>245</sup> John Locke, *The Second Treatise of Government and A Letter concerning Toleration* (Mineola: Dover Publications, 2002) 110-111.

<sup>246</sup> John Locke, *The Second Treatise of Government and A Letter concerning Toleration* (Mineola: Dover Publications, 2002) 111-112.

<sup>247</sup> John Locke, *The Second Treatise of Government and A Letter concerning Toleration* (Mineola: Dover Publications, 2002) 61.

<sup>248</sup> Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 25.

happiness depends on conformity with these laws.<sup>251</sup>

Human nature obtains happiness by pursuing justice. Failing to pursue justice inevitably leads to unhappiness.<sup>252</sup> Because justice and happiness are mutually interdependent, natural law derives from the precept “that man should pursue his own true and substantial happiness.”<sup>253</sup> This precept “is the foundation of what we call ethics, or natural law.”<sup>254</sup> Natural law permits

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<sup>249</sup> Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 26. “For as God, when he created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion, so, when he created man, and endued him with freewill to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby that freewill is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws.”

<sup>250</sup> Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 26. “For as God, when he created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion, so, when he created man, and endued him with freewill to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby that freewill is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws.” Reason is also required to guide man in applying the precepts of natural law in order to obtain happiness. Man corrupted his reason in the fall. Providence therefore reveals divine law in scripture. Such divine law is a part of the original law of nature, and its application leads to man’s felicity. Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 28.

<sup>251</sup> Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 27. “This is the foundation of what we call ethics, or natural law; for the several articles into which it is branched in our systems, amount to no more than demonstrating that this or that action tends to man’s real happiness, and therefore very justly concluding that the performance of it is a part of the law of nature; or, on the other hand, that this or that action is destructive of man’s real happiness, and therefore that the law of nature forbids it.”

<sup>252</sup> Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 27. “For he has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be attained but by observing the former; and, if the former be punctually obeyed, it cannot but induce the latter.”

<sup>253</sup> George Mason, the driving force behind the American Bill of Rights, echoes Blackstone in article I of the Virginia Bill of Rights: “Government is, or ought to be instituted for the common benefit, protection, and security of the people, nation, or community; of all the various modes and forms of government, that is best which is capable of producing the greatest degree of happiness and safety, and the most effectually secured against the danger of maladministration.”

<sup>254</sup> Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 27. “In consequence of which mutual connexion of justice and human felicity, he ‘has not perplexed the law of nature with a multitude of abstracted rules and precepts, referring merely to the fitness or unfitness of things, as some have vainly surmised, but has graciously reduced the rule of obedience to this one paternal precept, ‘that man should pursue his own true and substantial happiness.’ This is the foundation of what we call ethics, or natural law.” Note that ethics and natural law are identical for Blackstone, contrary to the positivist claim that there is no necessary connection between law and morality.

actions that promote man's real happiness, and forbids actions that destroy it.<sup>255</sup>

Substantively, natural law consists of eternal immutable laws of good and evil. "Such, among others, are these principles: that we should live honestly, should hurt nobody, and should render to every one his due; to which three general precepts Justinian has reduced the whole doctrine of law."<sup>256</sup>

Blackstone divides jurisprudence into natural law and positive law, distinguishing the rights and duties arising under each.<sup>257</sup> Positive law derives its validity and force from natural law, and any positive law that is contrary to natural law is invalid.<sup>258</sup> Individuals are furthermore bound to transgress positive laws that violate natural law, such as a law requiring us to commit murder.<sup>259</sup>

Nevertheless, natural law does not determine every legal issue. On most issues, man is at

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<sup>255</sup> Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 27.

<sup>256</sup> Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 27. Blackstone explains that the precept "that we should live honestly" invoked by Justinian has a richer meaning than merely avoiding dishonest conduct. Instead, it requires one to live *honorably* and avoid conduct that ultimately proves ruinous to society, such as "drunkenness, debauchery, profaneness, extravagance, gaming, etc." *Id.* at n. 2.

<sup>257</sup> Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 36, 38. Acts that violate natural law, such as murder, are "*mala in se*" or evil in themselves. Acts that violate positive law, such as counterfeiting, are "*mala prohibita*." They are evil only to the extent they are prohibited. Natural law is superior to all other law, and applies in all countries at all times. Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 27. Therefore, although an ambassador of a foreign nation may enjoy immunity from prosecution for violating a positive law against counterfeiting, he cannot escape prosecution for violating natural law's prohibition of murder. *Id.* at 189.

<sup>258</sup> Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 27. "[N]o human laws are of any validity, if contrary to [natural law]; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original." "No human law should be suffered to contradict" natural law. Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 28.

<sup>259</sup> Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 28-29.

liberty to adopt positive laws that benefit society.<sup>260</sup> Natural law is indifferent, for example, as to whether positive law permits the export of wool.<sup>261</sup>

## 2. Blackstone's Formulation of Natural Rights

Blackstone divides rights into two types, *absolute* rights and *relative* rights. The “immutable laws of nature” vest *absolute* rights in individuals.<sup>262</sup> Blackstone names the same *absolute* rights as Locke: personal security, personal liberty, and private property.<sup>263</sup> Individuals enjoy *absolute* rights in the state of nature, prior to the formation of society.<sup>264</sup>

The *absolute* right of personal security consists of “the legal enjoyment of life, limb,

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<sup>260</sup> Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 28. “There are, it is true, a great number of indifferent points in which [natural law leaves] man at his own liberty, but which are found necessary, for the benefit of society, to be restrained within certain limits. And herein it is that human laws have their greatest force and efficacy; for, with regard to such points as are not indifferent, human laws are only declaratory of, and act in subordination to, [natural law].”

<sup>261</sup> Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 28-29. “But, with regard to matters that are in themselves indifferent, and are not commanded or forbidden by those superior laws,—such, for instance, as exporting of wool into foreign countries,—here the inferior legislature has scope and opportunity to interpose, and to make that action unlawful which before was not so.”

<sup>262</sup> Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 89. “For the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature; but which could not be preserved in peace without that mutual assistance and intercourse, which is gained by the institution of friendly and social communities.”

<sup>263</sup> Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 93-94. Blackstone’s right to personal security includes the rights to life and health. Locke names the natural rights to life, health, liberty, and possessions in John Locke, *The Second Treatise of Government and A Letter concerning Toleration* (Mineola: Dover Publications, 2002) 3.

<sup>264</sup> Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 89. “By the absolute *rights* of individuals, we mean those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it.” Although Blackstone often refers to a pre-social state of nature, he treats it as a heuristic legal fiction. This is a common legal practice, such as the fiction that a corporation is a person for some legal purposes. Unlike Locke, Blackstone does not believe that man ever existed in an historical state of nature. “Not that we can believe, with some theoretical writers, that there ever was a time when there was no such thing as society either natural or civil; and that, from the impulse of reason, and through a sense of their wants and weaknesses, individuals met together in a large plain, entered into an original contract, and chose the tallest man present to be their governor.” *Id.* at 32.

body, health, and reputation.”<sup>265</sup> The *absolute* right of personal liberty consists of the free “power of locomotion, of changing situation, a moving of one’s person to whatsoever place one’s own inclination may direct, without an imprisonment or restraint, unless by due course of law.”<sup>266</sup> The *absolute* right of property consists of “every man’s free use and disposal of his own lawful acquisitions, without injury or illegal diminution.”<sup>267</sup>

*Relative* rights, in contrast to *absolute* rights, exist only in society.<sup>268</sup> The purpose of *relative* rights is “to serve as outworks or barriers to protect and maintain inviolate the three great and primary rights, personal security, personal liberty, and private property.”<sup>269</sup> Unlike *absolute* rights, which are “few and simple,” *relative* rights “are far more numerous and more complicated.”<sup>270</sup>

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<sup>265</sup> Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 93-97. Life is the inherent natural right of every individual, “and it begins in contemplation of law as soon as an infant is able to stir in the mother’s womb.” The unborn have legal capacities and substantial legal rights, “as if it were then actually born in the womb.” These capacities and rights include, in addition to the natural right to life, the capacities to receive a legacy, to receive a copyhold estate, to have a guardian, and to have sole possession of an estate. Blackstone points out that “in this point the civil law [the European code law system based on Roman law] agrees with ours.”

<sup>266</sup> Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 97-100. Blackstone considered the right to liberty the most important of the natural rights. “Of great importance to the public is the preservation of this personal liberty; for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper, (as in France it is daily practiced by the Crown) there would soon be an end of all other rights and immunities... confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.” *Id.* at 98.

<sup>267</sup> Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 100-02.

<sup>268</sup> Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 88. Relative rights “are incident to [individuals] as members of society, and standing in various relations to each other.”

<sup>269</sup> Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 102.

<sup>270</sup> Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 89. *Relative* rights are of two types. The first type is *public relative* rights. These rights involve the “public relations of magistrates and people.” Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 332. Blackstone names five *public relative* rights. These include (1) the constitution, powers, and privileges of parliament; (2) clear and certain limitations on the “king’s

### 3. Blackstone's Prohibition against Judge-Made Law

The power of judges to make new law is a key point of conflict in contemporary American jurisprudence. Legal positivism's "penumbra doctrine" holds that judges have discretion to make new law in almost every case.<sup>271</sup> Blackstone's jurisprudence, on the other hand, prohibits judges from making new law.<sup>272</sup> In Blackstone's view, judge-made law unites the power to *make* and *enforce* law in one body, and this invites tyranny.<sup>273</sup>

In applying the common law, the judge should determine the law "not according to his own private judgment, but according to the known laws and customs of the land." The judge is not "delegated to pronounce a new law, but to maintain and expand on the old one."<sup>274</sup>

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prerogative," or sovereign power; (3) the right of access to the courts for redress of injuries; (4) the right to petition the king and parliament for the redress of grievances, and (5) the right to bear arms sufficient to allow resistance and self-preservation when the laws and society "are insufficient to restrain the violence of oppression." *Id.* at 105. The second type of relative rights is *private relative* rights. These rights govern the legally significant relationships between members of society. Blackstone names four such relationships: (1) master and servant, (2) husband and wife, (3) parent and child, and (4) guardian and ward. *Id.* at 32.

<sup>271</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994), 12. See discussion of the penumbra doctrine in text at pages 28-29, *infra*.

<sup>272</sup> Blackstone's limits on judicial discretion reflect the Puritan emphasis on the sinfulness of all persons, including the judge himself, which Blackstone adopts from Sir Matthew Hale's groundbreaking work on the common law of England. Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge: Harvard UP, 2003) 265, 296-97. See Matthew Hale, *The Analysis of Law: A Scheme or Abstract of the Several Titles and Partitions of the Law of England, Digested into Method* (London: Nutt, 1716).

<sup>273</sup> Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 105: "In all tyrannical governments, the supreme magistracy, or the right of both *making* and of *enforcing* the laws, is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty. The magistrate may enact tyrannical laws, and execute them in a tyrannical manner, since he is possessed, in quality of dispenser of justice, with all the power which he, as legislator, thinks proper to give himself." Blackstone continues: "But, where the legislative and executive authority are in distinct hands, the former will take care not to entrust the latter with so large a power as may tend to the subversion of its own independence, and therewith of the liberty of the subject. With as, therefore, in England, this supreme power is divided into two branches; the one legislative, to wit, the parliament, consisting of king, lords, and commons; the other executive, consisting of the king alone." *Id.*

<sup>274</sup> Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 46-47. "For it is an established rule to abide by former precedents, where the same points come again in litigation: as well to keep the scale of justice even and steady, and not liable to waiver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before

Nevertheless, since all law is subject to the standard of reason, judges may set aside common law precedents that are “manifestly absurd or unjust” and contrary to reason. Blackstone, following Sir Edward Coke, saw the common law as the embodiment of reason itself, and no one man is wiser than the common law.<sup>275</sup> Setting unreasonable precedents aside does not create new law. Instead, it “vindicates the law from misrepresentation.”<sup>276</sup> Such precedents are not set aside because they are *bad law*, but because they are *not law*. *Unreasonable* rules of common law, by definition, are not law.

In applying statutory law, however, the judge may not exercise his discretion to set aside the will of parliament. The judge’s role is to “interpret and obey” the clear mandates of the legislature.<sup>277</sup> Judges may not act as legislatures in miniature. “In a democracy,” writes Blackstone, “the right of making laws resides in the people at large.”<sup>278</sup> The only authority that

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was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws, and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one.”

<sup>275</sup> Sir Edward Coke, *The First Part of the Institutes of the Laws of England*, vol. 1 (London: Hansard, 1809) §139: “Reason is the life of the law, nay, the common law itself is nothing else but reason; which is to be understood of an artificial perfection of reason, gotten by long study, observation, and experience, and not of every man’s natural reason; for, *Nemo nascitur artifex* [no one is born an artist]. This legal reason *est summa ratio* [is the highest reason]. And therefore, if all the reason that is dispersed into so many several heads, are united into one, yet could he not make such a law as the law of England is; because, by many successions of ages, it has been fined and refined by an infinite number of grave and learned men, and will experience growth to such a perfection, for the government of this realm, as the old rules may be justly verified of it, *Neminem oportet esse sapientiores legibus*: no man (out of his own private reason) ought to be wiser than the law, which is the perfection of reason.”

<sup>276</sup> Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 46-47. “Yet this rule admits of exception, where the former determination is most evidently contrary to reason; “much more if it be clearly contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*; that is, that it is not the established custom of the realm, as has been erroneously determined.”

<sup>277</sup> Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 27 n. 3.

<sup>278</sup> Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 33. It must be borne in mind that parliament plays the same role in the English legal system as the Bill of



can declare an act of parliament void is parliament itself.

## II. The Positivist Tradition in Jurisprudence

### A. Bentham's Criticism of Blackstone

Bentham marks the beginning of the transition from Blackstone's natural law jurisprudence to Hart's legal positivism. Blackstone wrote the *Commentaries on the Laws of England* after failing to obtain a professorship in civil law at Oxford.<sup>279</sup> Blackstone then delivered a series of private lectures at Oxford on the common law, and these lectures became the foundation of the *Commentaries*.<sup>280</sup> One of the attendees was sixteen-year-old Jeremy Bentham, who paid six guineas to attend Blackstone's lectures.<sup>281</sup>

Bentham listened with rebel ears. He published scathing criticisms of Blackstone twelve years later in his anonymous *Fragment on Government*.<sup>282</sup> Bentham criticizes Blackstone as "a determined and persevering enemy" of understanding and improving the law.<sup>283</sup> Bentham describes Blackstone's natural law theory as "theological grimgribber" and an "excursion into

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Rights plays in the American legal system. England has no formal written Constitution. Rather, the English "constitution" developed historically through significant enactments of Parliament. Blackstone lists these acts in his discussion of the historical development of Parliament. *Id.* at 105-112.

<sup>279</sup> Julian S. Waterman, "Mansfield and Blackstone's *Commentaries*," *U. Chi. L. Rev.* 1 (4) (1934): 549-571, 550.

<sup>280</sup> W. S. Holdsworth, "Some Aspects of Blackstone and His *Commentaries*," *Cambridge L. J.* 4 (3) (1932): 261-285, 263.

<sup>281</sup> Jeremy Bentham, *A Comment on the Commentaries and A Fragment on Government*, ed. J.H. Burns and H.L.A. Hart (London: Athlone Press 1977) xix-xxi. According to the Library of the House of Commons, the British pound in 1750 was worth 116 times its value in 1998. Library of the House of Commons, "Inflation: the Value of the Pound 1750-1998," Research Paper 99/20, 23 Feb. 1999.

<sup>282</sup> Bentham's *Fragment* was described as "the most trenchant critique ever penned by a youthful pupil on the doctrines of a celebrated teacher whose dogmas were accepted by the learned world as profound truths." Julian S. Waterman, "Thomas Jefferson and Blackstone's *Commentaries*," *Ill. L. Rev.* 27 (6) (1933): 629-659, 629.

<sup>283</sup> Richard Posner summarizes *A Fragment on Government* as making two fundamental criticisms of Blackstone: "The first was that Blackstone was a shameless apologist for the status quo, an enemy of all reform, a Pangloss blind to the shocking deficiencies of the English legal system. The second was that Blackstone's analysis of the nature and sources of legal obligation was shallow, amateurish, and contradictory; that, as Samuel Johnson is reported to have said, Blackstone 'thought clearly, but he thought faintly.'" Richard Posner, "Blackstone and Bentham," *J. Law and Econ.* 19 (3) (1996): 569-606, 570.

the land of fancy.”<sup>284</sup> Bentham displays a ferocious antipathy towards Blackstone, describing Blackstone as “corrupting everything he touches,” “vulgar,” “infected with the foul stench of intolerance,” “prejudiced,” and “disingenuous.”<sup>285</sup>

### **B. Bentham’s “Imperative Theory” of Law**

Although legal positivism has antecedents in ancient and medieval thought,<sup>286</sup> it finds its first full elaboration in Bentham’s work.<sup>287</sup> H.L.A. Hart, the leading commentator on Bentham’s legal philosophy, highlights two distinguishing features in Bentham’s legal theory. The first is Bentham’s “imperative” theory of law, and the second is the view that law has no necessary conceptual connection with morality.<sup>288</sup>

Bentham defines law as (1) the assemblage of signs of a sovereign’s volition, (2) directing the conduct of persons under his power, (3) accompanied by an “expectation” in such

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<sup>284</sup> Jeremy Bentham, *A Comment on the Commentaries and A Fragment on Government*, ed. J.H. Burns and H.L.A. Hart (London: Athlone Press 1977) 10. Bentham asks, “What is there to be learned from these speculations? Nothing. What is to be concluded from them? Nothing.” *Id.* at 11.

<sup>285</sup> Richard Posner, “Blackstone and Bentham,” *J. Law and Econ.* 19 (3) (1996): 569-606, 590. Bentham’s descriptions of Blackstone include the following: “His hand was formed to embellish and to corrupt everything it touches. He makes men think they see, in order to prevent their seeing.” “His is the treasury of vulgar errors, where all the vulgar errors that are, are collected and improved.” “He is infected with the foul stench of intolerance, the rankest degree of intolerance that at this day the most depraved organ can endure.” “In him every prejudice has an advocate, and every professional chicanery an accomplice.” “His are crocodile lamentations.” “He carries the disingenuousness of the hireling Advocate into the chair of the Professor. He is the dupe of every prejudice, and the abettor of every abuse. No sound principles can be expected from that writer whose first object is to defend a system.”

<sup>286</sup> John Finnis, “The Truth in Legal Positivism,” *The Autonomy of Law*, ed. Robert P. George (Oxford: Clarendon Press, 1996) 195-214.

<sup>287</sup> Jeremy Bentham, *Of Laws in General*, ed. H.L.A. Hart (London: Athlone Press, 1970), originally published in 1832.

<sup>288</sup> H.L.A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford: Oxford University Press, 1982), 17-18. This collection brings together Hart’s most important discussions of Bentham’s legal theory. Works which deal with Bentham’s legal theory in detail include G.J. Postema, *Bentham and the Common Law Tradition* (Oxford: Oxford University Press, 1986); D. Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (Cambridge: Cambridge University Press, 1989); M.J. Lobban, *The Common Law and English Jurisprudence 1760–1850* (Oxford: Oxford University Press, 1991); and O. Ben Dor, *Constitutional Limits and the Public Sphere: A Critical Study of Bentham’s Constitutionalism* (Oxford: Oxford University Press, 2000).

persons, that (4) motivates obedience.<sup>289</sup> Bentham denies Blackstone's claim that nature establishes the existence of immutable standards of right and wrong that inevitably lead to justice and happiness. Instead, Bentham asserts that "Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. It is for them alone to point out what we ought to do," and they alone are "the standard of right and wrong."<sup>290</sup>

Bentham founds his legal positivism on his claims about the meaning and use of words. Describing natural law and natural rights as "so much bawling on paper," Bentham rejects the existence of any form of legal rights other than those expressly granted by "real" positive law. In *Anarchical Fallacies*, Bentham's criticism of the Declaration of Rights issued by the French National Assembly in 1789, Bentham argues that natural laws and rights are "imaginary:"

Right is the child of law; from real laws come real rights, but from imaginary laws, from the "laws of nature," come imaginary rights... Natural rights is simple nonsense: natural and imprescriptible rights, nonsense upon stilts... They know not of what they are talking under the name of natural rights, and yet they would have them imprescriptible.<sup>291</sup>

Only positive laws can create rights, and since positivism sees law as founded on the will of its maker, all positive laws require the existence of a sovereign. There can be no rights outside the existence of a sovereign command, and no rights can exist prior to the formation of a

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<sup>289</sup> Jeremy Bentham, *Of Laws in General*, ed. H.L.A. Hart (London: Athlone Press, 1970), 1. Bentham states his definition as follows: "an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power: such volition trusting for its accomplishment to the expectation of certain events which it is intended such declaration should upon occasion be a means of bringing to pass, and the prospect of which it is intended should act as a motive upon those whose conduct is in question."

<sup>290</sup> Jeremy Bentham, *Introduction to the Principles of Morals and Legislation* (Oxford: Clarendon Press, 1907), 1.

<sup>291</sup> Jeremy Bentham, "Anarchical Fallacies; Being an Examination of The Declarations of Rights Issued During the French Revolution," *The Works of Jeremy Bentham*, vol. 2 (Edinburgh: William Tate, 1843) 501.

government.<sup>292</sup> Applying the linguistic methodology that has become the hallmark of legal positivism, Bentham labels the concept of pre-existing “natural rights” as a “perversion of language.” The term “natural rights” is “ambiguous,” “sentimental,” and “figurative,” and it has anarchical consequences.<sup>293</sup>

In contrast to Austin and Hart, Bentham opposed judge-made law. Like Blackstone, Bentham recognized the *ex post facto* problem with judges making the law at the same time they decide the case. Bentham famously compares a judge making law to a man beating his dog.<sup>294</sup>

### C. John Austin's “Command Theory” of Law

John Austin’s jurisprudence provides the starting point and “credo” for H.L.A. Hart’s legal positivism. John Austin’s “command” theory of law adopts and modifies Bentham’s “imperative” theory. Austin defines law as “a rule laid down for the guidance of intelligent

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<sup>292</sup> Jeremy Bentham, “Anarchical Fallacies; Being an Examination of The Declarations of Rights Issued During the French Revolution,” *The Works of Jeremy Bentham*, vol. 2 (Edinburgh: William Tate, 1843) 505. Bentham argues that there are no rights in the absence of positive law, and that rights are determined solely by positive law: “*These bounds [of rights] cannot be determined but by the law.* More contradiction, more confusion. What then? This liberty, this right, which is one of four rights that existed before laws, and will exist in spite of all that laws can do, owes all the boundaries it has, all the extent it has, to the laws. *Till you know what the laws say to it, you do not know what there is of it, nor what account to give of it:* and yet it existed, and that in full force and vigour, before there were any such things as laws; and so will continue to exist, and that for ever, in spite of anything which laws can do to it. *Still the same inaptitude of expressions--still the same confusion of that which it is supposed is, with that which it is conceived ought to be.*” [Emphasis added].

<sup>293</sup> Jeremy Bentham, “Anarchical Fallacies; Being an Examination of The Declarations of Rights Issued During the French Revolution,” *The Works of Jeremy Bentham*, vol. 2 (Edinburgh: William Tate, 1843) 407. “In a play or a novel, an improper word is but a word: and the impropriety, whether noticed or not, is attended with no consequences. In a body of laws--especially of laws given as constitutional and fundamental ones--an improper word may be a national calamity--and civil war may be the consequence of it. Out of one foolish word may start a thousand daggers.”

<sup>294</sup> Jeremy Bentham, “Truth versus Ashhurst; or, Law as it is, contrasted with what it is said to be,” *The Works of Jeremy Bentham*, ed. Sir John Bowring, vol. 5 (Edinburgh: Tait, 1843) 231-238, 245: “Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make laws for you and me. They won't tell a man beforehand what it is he *should not do*—they won't so much as allow of his being told: they lie by till he has done something which they say he should not *have done*, and then they hang him for it.”

beings, by an intelligent being having power over him.”<sup>295</sup> Austin names four elements in his “command theory” of positive law: (a) commands,<sup>296</sup> (b) backed by threat of sanctions, (c) from a sovereign, (d) to whom people have a habit of obedience.<sup>297</sup> Austin’s “command” theory of law is widely criticized, often because the command of a gun-wielding highwayman arguably satisfies its requirements. H.L.A. Hart abandons the “command theory” of law altogether, replacing it with a model of law as the union of primary and secondary social rules.<sup>298</sup>

Unlike Bentham, Austin accepts a broad exercise of judicial discretion.<sup>299</sup> Austin agrees with Bentham, however, that Blackstone’s analysis that absurd or unjust legal provisions are *not law* is “stark nonsense.”

The existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it.<sup>300</sup>

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<sup>295</sup> John Austin, *The Province of Jurisprudence Determined*, (Amherst, NY: Prometheus, 2000) 1.

<sup>296</sup> John Austin, *The Province of Jurisprudence Determined*, (Amherst, NY: Prometheus, 2000) 14: “‘Commands’ involve an expressed wish that something be done, combined with a willingness and ability to impose ‘an evil’ for failure to comply with that wish.”

<sup>297</sup> The “sovereign” is defined as a person (or determinate body of persons) who receives habitual obedience from the bulk of the population, but who does not habitually obey any other (earthly) person or institution. Austin thought that all independent political societies, by their nature, have a sovereign. John Austin, *The Province of Jurisprudence Determined*, (Amherst, NY: Prometheus, 2000) 225-31.

<sup>298</sup> See discussion of primary and secondary rules in text at pages 16-17, *infra*.

<sup>299</sup> John Austin, *The Province of Jurisprudence Determined*, (Amherst, NY: Prometheus, 2000) 191: “I cannot understand how any person who has considered the subject can suppose that society could possibly have gone on if judges had not legislated, or that there is any danger whatever in allowing them that power which they have in fact exercised, to make up for the negligence or the incapacity of the avowed legislator. That part of the law of every country which was made by judges has been far better made than that part which consists of statutes enacted by the legislature. Notwithstanding my great admiration for Mr. Bentham, I cannot but think that, instead of blaming judges for having legislated, he should blame them for the timid, narrow, and piecemeal manner in which they have legislated, and for legislating under cover of vague and indeterminate phrases.” *Id.* Hart agrees with Austin and legitimizes judicial discretion as normal and necessary. “The judge [in cases in which the law is indeterminate or incomplete] ... must exercise his discretion and make law for the case instead of merely applying already pre-existing settled law.” H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Clarendon Press, 1994), 272-276.

<sup>300</sup> John Austin, *The Province of Jurisprudence Determined*, (Amherst, NY: Prometheus, 2000) 184. Austin continues: “Sir William Blackstone, for example, says in his ‘Commentaries,’ that the laws of God are superior in obligation to all other laws; that no human law should be suffered to contradict them; that

Hart adopts this statement as the credo for his version of positivism, characterizing it as a distinction between “law as it is” and “law as it ought to be.”<sup>301</sup> Hart employs this distinction to provide the basis for two core tenets of legal positivism. The first claim, known as the “Separability Thesis,” asserts that there is no necessary connection between law and morality.<sup>302</sup>

The second claim, known as the “Social Fact Thesis,” maintains that the moral content of a law is irrelevant to its validity and enforceability. The sole determinant of legal validity is the law’s compliance with a social fact.<sup>303</sup> The paradigm social fact asserted by Hart is a “secondary rule,” the “rule of recognition” by public officials.<sup>304</sup> Legal positivism holds that any law, even “morally iniquitous laws” with “no moral justification or force whatever,” are enforceable so long as public officials recognize the law as valid.<sup>305</sup> Unlike natural law jurisprudence, the validity of law under legal positivism is “unrestricted” by the demands of reason and natural law precepts.

## **D. Hart’s Positivism**

### **1. Three Doctrines of the Utilitarian Tradition in Jurisprudence**

The modern era of legal positivism began on April 30, 1957, with H.L.A. Hart’s lecture

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human laws are of no validity if contrary to them; and that all valid laws derive their force from that Divine original... Now, to say that human laws which conflict with the Divine law are not binding, that is to say, are not laws, is to talk stark nonsense.” *Id.* 185.

<sup>301</sup> H. L. A. Hart, “Positivism and the Separation of Law and Morals,” *Harv. L. Rev.* 71 (4) (1958): 593–629, 594. “Bentham and Austin constantly insisted on the need to distinguish, firmly and with the maximum of clarity, law as it is from law as it ought to be. This theme haunts their work, and they condemned the natural-law thinkers precisely because they had blurred this apparently simple but vital distinction.”

<sup>302</sup> In *The Concept of Law*, Hart writes, “In some legal systems, as in the United States, the ultimate criteria of legal validity explicitly incorporate principles of justice or substantive moral values ...” H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994), 204.

<sup>303</sup> For Austin, the paradigm social fact was the existence of a sovereign. The paradigm social fact for Hart is the rule of recognition. See discussion of the rule of recognition in the text at pages 16-17, *infra*.

<sup>304</sup> See discussion of Hart’s concepts of “primary” and “secondary” rules in the text at pages 16-17, *infra*.

<sup>305</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 268.

“Positivism and the Separation of Law and Morals” at Harvard Law School. Hart’s lecture emphasizes three doctrines asserted by Austin and Bentham “that constitute the utilitarian tradition in jurisprudence.”<sup>306</sup> The first of these doctrines is the positivist commitment to the separation of law and morals, which Hart describes as the distinction between law “as it is” and law “as it ought to be.” This theme “haunts the work” of Bentham and Austin, who criticize natural law thinkers for “blurring this distinction.”<sup>307</sup>

Hart explains that the distinction between “law as it is” and “law as it ought to be” implies two things. First, in the absence of an express constitutional or legal provision, the mere fact that a rule violates standards of morality does not mean that it is not a valid rule of law. Secondly, the mere fact that a rule is morally desirable does not make it a rule of law.<sup>308</sup>

Hart then addresses the second and third traditional doctrines of positivism. The second is the importance of an analytical approach to legal concepts. “A study of the meaning of the distinctive vocabulary of the law is as vital to our understanding of the nature of law as historical or sociological studies.”<sup>309</sup> The third is the imperative theory that law is “essentially a command.” “These three doctrines constitute the utilitarian tradition in jurisprudence; yet they

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<sup>306</sup> H. L. A. Hart, “Positivism and the Separation of Law and Morals,” *Harv. L. Rev.* 71 (4) (1958): 593–629, 601. These three doctrines are (1) the separation of law and morals, (2) the importance of a purely analytical study of legal concepts, and (3) the imperative theory of law that law is essentially a command.

<sup>307</sup> H. L. A. Hart, “Positivism and the Separation of Law and Morals,” *Harv. L. Rev.* 71 (4) (1958): 593–629, 594. “Bentham and Austin constantly insisted on the need to distinguish, firmly and with the maximum of clarity, law as it is from law as it ought to be. This theme haunts their work, and they condemned the natural-law thinkers precisely because they had blurred this apparently simple but vital distinction.”

<sup>308</sup> H. L. A. Hart, “Positivism and the Separation of Law and Morals,” *Harv. L. Rev.* 71 (4) (1958): 593–629. Hart further explains that although there is no *necessary* connection between law and morality, the separation between laws and morals need not be *absolute*. “[N]either Bentham nor his followers denied that by explicit legal provisions moral principles might at different points be brought into a legal system and form part of its rules, or that courts might be legally bound to decide in accordance with what they thought just or best... [Austin] would have recognized that a statute, for example, might confer a delegated legislative power and restrict the area of its exercise by reference to moral principles.”

<sup>309</sup> H. L. A. Hart, “Positivism and the Separation of Law and Morals,” *Harv. L. Rev.* 71 (4) (1958): 593–629, 601.

are distinct doctrines.”<sup>310</sup>

Hart is careful to present these three ideas as “distinct doctrines,” for although Hart adopts the first two doctrines, he dispenses with the most heavily criticized of the three doctrines, Austin’s “command” theory of law. Hart replaces the “command” theory with his most significant contribution to jurisprudence, the model of law as a union of primary and secondary rules.<sup>311</sup>

## 2. Law as the Union of Primary and Secondary Rules

Austin’s imperative theory of law depicts law as the command of a sovereign backed by a coercive threat.<sup>312</sup> Hart rejects Austin’s theory for four reasons. First, Austin’s model fails to recognize that laws generally apply to those who enact them. Second, Austin’s model does not account for laws granting public powers, such as the power to legislate or adjudicate, or for laws granting private powers to create or vary legal relations. Third, Austin’s model fails to account for laws that originate, not from a sovereign, but out of common custom. Fourth, Austin’s model fails to account for the continuity of legislative authority characteristic of a modern legal system.<sup>313</sup>

In place of Austin’s theory of law as the orders of a sovereign backed by threats, Hart offers the model of law as the union of primary and secondary social rules. A *primary rule* is a rule that imposes an obligation or a duty. “[P]rimary rules are concerned with the actions that

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<sup>310</sup> H. L. A. Hart, “Positivism and the Separation of Law and Morals,” *Harv. L. Rev.* 71 (4) (1958): 593–629. “The other doctrine was the famous imperative theory of law — that law is essentially a command. These three doctrines constitute the utilitarian tradition in jurisprudence; yet they are distinct doctrines.”

<sup>311</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 79-99.

<sup>312</sup> Hart restates Austin’s theory, for purposes of discussion, as “the laws of any country will be the general orders backed by threats which are issued either by the sovereign or subordinates in obedience to the sovereign.” H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994), 25.

<sup>313</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 79.



individuals must or must not do.”<sup>314</sup> Examples of primary rules include torts and criminal laws. A rule imposes an obligation or duty when the demand for conformity is insistent and the social pressure brought to bear upon those who deviate from the rule is great.<sup>315</sup>

In order for a system of primary rules to function effectively, Hart states that *secondary rules* may also be necessary in order to provide an authoritative statement of all the primary rules. In contrast to primary rules, which impose obligations and duties, secondary rules confer powers to introduce, to change, or to modify a primary rule. These powers may be public or private.<sup>316</sup>

There are three types of secondary rules. The first type is the *rule of change*. This type of secondary rule allows legislators to make changes in the primary rules if the legislators determine that the primary rules are defective or inadequate.<sup>317</sup> The second type of secondary rule is the *rule of adjudication*. This type of secondary rule enables courts to resolve disputes over the interpretation and application of the primary rules.<sup>318</sup>

The third type of secondary rule is *the rule of recognition*. The rule of recognition provides “a rule for conclusive identification of the primary rules of obligation,”<sup>319</sup> and it also serves as Hart’s ultimate criterion for the validity of law.<sup>320</sup> A rule is legally valid, and therefore

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<sup>314</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 94. Primary rules “contain in some form restrictions on the free use of violence, theft, and deception to which human beings are tempted but which they must, in general, repress, if they are to coexist in close proximity to each other.” *Id.* at 91.

<sup>315</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 91.

<sup>316</sup> Private powers include such powers as making wills, contracts, transferring property, and other voluntarily created structures of rights and duties that typify life under law. Public powers include such powers as creating, repealing, or amending legislation and adjudicating disputes. H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 96-97.

<sup>317</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 95-96.

<sup>318</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 97-98.

<sup>319</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 95.

enforceable, if it conforms to the requirements set forth in the rule of recognition.<sup>321</sup>

### 3. External and Internal Points of View

In addition to primary and secondary rules, Hart's theory of law also contains two ways of looking at sets of legal rules, commonly referred to as the *external* and *internal* points of view. Hart uses *primary* and *secondary* rules to determine the existence and validity of an *individual law*. Hart uses the *external* and *internal* points of view to define the existence and validity, not of an individual law, but of a *legal system* in its entirety.

The *external point of view* is the view of a person who feels no obligation that he “should” follow the law.<sup>322</sup> The person adopting the external point of view has no feeling or sense that he “should” or “ought” to follow the law. He has no sense that it is “right” to follow the law or that it is “wrong” not to do so, and refuses to look upon the law as a standard of conduct for himself or others.<sup>323</sup> The external point of view is present in people engaging in mere “social habits” and “group habits.”<sup>324</sup>

The *internal point of view*, on the other hand, is the view of a person who feels obligated to follow the law. The internal point of view requires an affirmative endorsement of the legal rules and standards governing behavior. A person acting from the internal point of view follows the law because he thinks it is *right* to do so, and *wrong* not to do so. He feels that he *ought*,

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<sup>320</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 105: “The rule of recognition providing the criteria by which the validity of other rules of the system is assessed is in an important sense, which we shall try to clarify, an ultimate rule: and where, as is usual, there are several criteria are ranked in order of relative subordination and primacy one of them is supreme.”

<sup>321</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 103: “To say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition and so as a rule of the system. We can indeed simply say that the statement that a particular rule is valid means that it satisfies all the criteria provided by the rule of recognition.”

<sup>322</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 56.

<sup>323</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 56.

<sup>324</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 56, 57. Hart defines such habits as regular, uniform behavior that occurs without the pressure of a social rule mandating that behavior “in the normative terminology of ‘ought’, ‘must’, and ‘should’, ‘right’, and ‘wrong’.”

*must*, and *should* follow the law. The internal point of view distinguishes social rules, such as the rule of recognition,<sup>325</sup> from mere group habits.<sup>326</sup>

#### 4. Hart's Two Conditions for the Existence and Validity of a Legal System

Using the external and internal points of view, Hart next explains the two conditions for the existence and validity of a legal system. The first condition is that private citizens generally obey the primary rules of obligation. It is sufficient that each member of the population obeys the primary rules "for his part only" and "from any motive whatsoever." In Hart's terms, it is *sufficient* that *citizens* take an *external* point of view toward *primary* rules.<sup>327</sup> Contrary to natural law jurisprudence, the consent of the governed is irrelevant under positivism to the existence or validity of a legal system.

The second condition for the existence and validity of a legal system is that public officials adopt the rule of recognition specifying the criteria for legal validity as their "public standard of official behavior." Officials must feel themselves obligated to adopt and abide by the rule of recognition and censure those public officials who fail to do so. In Hart's terms, it is a minimum *necessary* condition that *officials* take the *internal* point of view toward *secondary*

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<sup>325</sup> Social rules include ordinary social customs, which may or may not have legal force, as well as important legal rules, including the rule of recognition. H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994), 256.

<sup>326</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 56-57. Demands for conformity with the internal point of view are expressed "in the normative terminology of 'ought', 'must', and 'should', 'right', and 'wrong'."

<sup>327</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 116. "There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand, those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials. The first condition is the only one which private citizens need satisfy: they may obey each 'for his part only' and from any motive whatever; though in a healthy society they will in fact often accept these rules as common standards of behaviour and acknowledge an obligation to obey them, or even trace this obligation to a more general obligation to respect the constitution. The second condition must also be satisfied by the officials of the system. They must regard these as common standards of official behaviour and appraise critically their own and each other's deviations as lapses."

rules.<sup>328</sup>

Contrary to natural law jurisprudence, law is not autonomous under positivism. Law wields no supremacy over political rulers because positivism founds law on the will of the lawmaker.<sup>329</sup> Different rules govern public officials than govern the rest of society, and only public officials have the authority to determine legal validity.<sup>330</sup>

## 5. Hart's Acceptance of Judge-Made Law

Hart accepts the broad exercise of judicial power in making new law. One of the most significant and controversial aspects of Hart's positivism is his justification of judge-made law on linguistic grounds under the "penumbra doctrine." Laws, Hart argues, consist of rules that can determine results only at the core of their meaning. Outside this core of meaning, legal terms present a penumbra of uncertainty. This "uncertainty at the borderline" of meaning gives law an "open texture."<sup>331</sup> According to Hart, only the judge's discretion can resolve this uncertainty. Hart expressly rejects the tradition, adopted by Sir Matthew Hale and Blackstone, that judges "find" and do not "make" law.<sup>332</sup>

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<sup>328</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 117.

<sup>329</sup> Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge: Harvard UP, 2003) 241.

<sup>330</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994), 79-99. Hart's model of law depicts law as the union of primary and secondary social rules. Secondary rules confer powers to introduce, change, or modify a primary rule. Secondary rules confer *public* powers on public officials (only) to change, adjudicate, and determine the validity of legal duties and obligations for the general population. The paradigm rule is the secondary rule of recognition, which empowers public officials (only) to determine the validity of a law.

<sup>331</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 128: "Whichever device, precedent or legislation, is chosen for the communication of standards of behavior, these, however smoothly they work over the great mass of ordinary cases, will, at some point when their application is in question, prove indeterminate; they will have what has been termed an *open texture*. So far we have presented this, in the case of legislation, as a general feature of human language; uncertainty at the borderline is the price to be paid for the use of general classifying terms in any form of communication concerning matters of fact."

<sup>332</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 12. See discussion of the "declaratory theory" that judges "find" and do not "make" law at page 7, *supra* and Hart's "penumbra doctrine" at pages 28-29, *infra*.

## 6. Hart's Acceptance of "Morally Iniquitous Provisions" as Valid Law

Hart denies any necessary connection between the validity of law and morality:

I argue in this book that though there are many different *contingent* connections between law and morality there are no *necessary* conceptual connections between the content of law and morality; and *hence morally iniquitous provisions may be valid* as legal rules or principles. One aspect of this form of the separation of law from morality is that there can be legal rights and duties which have no moral justification or force whatever.<sup>333</sup> [Emphasis added].

Hart justifies the "separation of law and morality," the unrestricted validity of morally iniquitous laws, as an analytical aid.<sup>334</sup> Hart's linguistic analysis, however, wholly ignores the practical consequences of accepting "morally iniquitous provisions" of law having "no moral justification or force whatsoever."<sup>335</sup> The positivist acceptance of morally iniquitous laws permits a legal system that does more than merely denying the natural law principles of reason, autonomy, and consent. It permits a legal system where "anything goes" and *any* legal provision is potentially enforceable as valid.<sup>336</sup>

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<sup>333</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 268.

<sup>334</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 211. Hart argues that the refusal to recognize evil laws as valid is "too crude a way [to deal] with delicate and complex moral issues. The concept of law which allows the invalidity of law to be distinguished from its immorality, enables us to see the complexity and variety of these separate issues; whereas a narrow concept of law which denies legal validity to iniquitous rules may blind us to them."

<sup>335</sup> An apparent inconsistency in Hart's version of legal positivism involves his claim that it is *necessary* to the existence of a legal system that officials take the internal point of view towards secondary rules. According to Hart, a person acting from the internal point of view follows the law because he thinks it is *right* to do so, and *wrong* not to do so. He feels that he *ought*, *must*, and *should* follow the law. H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 56-57. Thus, the internal point of view involves a moral duty.

<sup>336</sup> Contemporary natural law theorists also find "morally iniquitous provisions" unacceptable. For the contemporary natural rights theorist, the acceptance of "morally iniquitous provisions" serves no valid purpose. Fuller would argue that "morally iniquitous provisions" violate his eight principles of internal morality, and "results in something that is not properly called a legal system at all." Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964), 39. John Finnis would argue that "morally iniquitous provisions" could not be legally valid, for they cannot provide any adequate justification for use of the state coercive power. Although such provisions might be legally binding, such provisions are not obligatory in the fullest sense because they fail to realize the moral ideals implicit in the concept of law. John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), 23-24.

### III. The Supplanting of Natural Law by Legal Positivism

#### A. Blackstone's Dominance in American Jurisprudence

Published in four volumes from 1765 to 1769, Blackstone's *Commentaries on the Laws of England* became the most influential book in American legal history.<sup>337</sup> The *Commentaries* dominated American jurisprudence. *Marbury v. Madison*, arguably the most significant court decision in American history, cites the *Commentaries* four times in support of its power of judicial review.<sup>338</sup> In the first century of American jurisprudence, Blackstone's *Commentaries* were not merely an approach to the study of law. For most lawyers and judges, the *Commentaries* constituted all there was of the law.<sup>339</sup>

The *Commentaries* shaped the intellect of the founders. Blackstone is the European scholar most often cited in the writings of the founders.<sup>340</sup> Subscribers to the first American edition of the *Commentaries* included John Jay, the first Chief Justice of the United States Supreme Court; John Marshall, the most influential justice in the history of the United States Supreme Court; James Wilson, the most learned and influential delegate to the Constitutional Convention;<sup>341</sup> Nathaniel Greene, Washington's most able and dependable general; and John

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<sup>337</sup> Gareth Jones, ed., *The Sovereignty of the Law, Selections from Blackstone's Commentaries on the Laws of England* (Toronto: University of Toronto Press, 1973). Blackstone originally published the *Commentaries* in four volumes from 1765 to 1769. "The influence of Blackstone's *Commentaries on the Laws of England*...was phenomenal and as great in America as in England." Lee Cameron McDonald, *Western Political Theory* (New York: Harcourt, Brace, Jovanovich, Inc, 1968), 360.

<sup>338</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803).

<sup>339</sup> Daniel J. Boorstin, *The Mysterious Science of the Law: An Essay on Blackstone's Commentaries* (Boston: Beacon Press, 1958) 3: "In the first century of American jurisprudence, the commentaries were not merely an approach to the study of law; for most lawyers that constituted all there was of the law."

<sup>340</sup> Donald S. Lutz, "The Relative Influence of European Writers on Late Eighteenth Century American Political Thought," *American Political Science Review*, 78 (1984), 184.

<sup>341</sup> James Wilson was a member of the Continental Congress, a signer of the Declaration of Independence, a delegate to the Constitutional Convention, a justice of the United States Supreme Court, and the first professor of law in what became the University of Pennsylvania. Albert W. Altschuler, "Rediscovering Blackstone," *U. Penn. L. Rev.* 145 (1) (1996): 1-55, 10 n. 44.

Adams.<sup>342</sup> Blackstone's *Commentaries* "taught American Revolutionaries their rights, helped inspire the Declaration of Independence, influenced the deliberations of the Constitutional Convention, articulated a sense of providence like the one that touched Abraham Lincoln, and instructed the [descendents] of his initial American readers of the virtues of the English common law."<sup>343</sup>

The *Commentaries* also helped to lay the foundation stones of the new republic. "All of our formative documents-the Declaration of Independence, the Constitution, the Federalist papers, and the seminal decisions of the Supreme Court under John Marshall-were drafted by attorneys steeped in [Blackstone's *Commentaries*]. So much was this the case that the *Commentaries* ranked second only to the Bible as a literary and intellectual influence on the history of American institutions."<sup>344</sup>

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<sup>342</sup> Albert W. Altschuler, "Rediscovering Blackstone," *U. Penn. L. Rev.* 145 (1) (1996): 1-55, 5-6.

<sup>343</sup> Albert W. Altschuler, "Rediscovering Blackstone," *U. Penn. L. Rev.* 145 (1) (1996): 1-55, 15-16. Blackstone's favorable reception in America was dampened, however, by his political opposition to the positions of the American colonists. As a member of Parliament from 1761 to 1770, Blackstone voted to maintain the Stamp Act. Blackstone's *Commentaries* denies that Americans enjoyed the common law rights of British subjects, because the common law did not extend to territories such as America that had been conquered and that already had their own law. Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1840) 77-78. Blackstone also maintains that freedom of the press consists only of freedom from prior censorship. "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publication, and not in freedom from censure for criminal manner when published." This restraint on the press is "necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty." Sir William Blackstone, *Commentaries on the Laws of England*, vol. 4, sec. 151-53 (New York: W.E. Dean, 1840). James Wilson challenged Blackstone's views of parliamentary supremacy and the rights of colonists. Altschuler explains that Blackstone's reception was also tempered by his apologies for the Crown, the established church, and other English institutions rescinded by the colonists, as well as by the "determination of Americans to create their own law." Albert W. Altschuler, "Rediscovering Blackstone," *U. Penn. L. Rev.* 145 (1) (1996): 1-55, 9-10.

<sup>344</sup> Robert A. Ferguson, *Law and Letters in American Culture* (Cambridge: Harvard UP, 1984) 11. Daniel Boorstin observes that "in the history of American institutions, no other book-except the Bible-has played so great a role." Daniel J. Boorstin, *The Mysterious Science of the Law: An Essay on Blackstone's Commentaries* (Boston: Beacon Press, 1958) iii. Boorstin continues: "In the first century of American jurisprudence, the commentaries were not merely an approach to the study of law; for most lawyers that constituted all there was of the law." *Id.* at 3.

## **B. Transition from Natural Law to Positivism**

American jurisprudence is nevertheless transitioning from Blackstone to Hart. As explained below, four factors are propelling this transition. The first is the abandonment of Blackstone's *Commentaries* in the study of law. The second is the rise of value skepticism in American jurisprudence. The third is the entrenchment of analytic philosophy in the American academy. The fourth is the ubiquitous desire of judges to *make* law, and not merely *find* it.

## **C. The Abandonment of Blackstone's *Commentaries* in American Legal Education**

### **1. Blackstone's Former Dominance of Legal Education**

For more than a century, almost every American lawyer studied Blackstone's *Commentaries* as the foundation of their legal education.<sup>345</sup> Published reports of American decisions did not exist in the decades surrounding the American Revolution, and reports of English decisions were frequently unavailable.<sup>346</sup> In many jurisdictions, Blackstone's four volumes represented "all there was of the law."<sup>347</sup>

Carl Sandburg describes Blackstone's influence on the life of Abraham Lincoln. The young Lincoln was advised by a lawyer friend that Blackstone's *Commentaries* was the first book that a prospective lawyer should read, and Lincoln fortuitously obtained a copy from a man driving west who needed to lighten the load of his covered wagon.<sup>348</sup> Twenty-five years later, Lincoln wrote a letter advising another young man to "come to the law" as Lincoln had, by

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<sup>345</sup> David A. Lockmiller, *Sir William Blackstone* (Chapel Hill: UNC Press, 1938) 176. Lockmiller estimates that reported decisions in the United States between 1879 and 1915 cited Blackstone's *Commentaries* at least 10,000 times. *Id.* at 181.

<sup>346</sup> Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991) 23.

<sup>347</sup> Daniel J. Boorstin, *The Mysterious Science of the Law: An Essay on Blackstone's Commentaries* (Cambridge: Harvard UP, 1941) 3.

<sup>348</sup> Carl Sandburg, *Abraham Lincoln: The Prairie Years*, vol. 1 (New York: Harcourt Brace and Co., 1926) 164.



reading Blackstone “for himself, without an instructor.”<sup>349</sup>

A 1914 Carnegie Foundation study records that “all of the older American law schools started by being so-called lecture schools. Blackstone’s *Commentaries*, which, as we know, were used for purposes of instruction earlier and with far more lasting effect in America than in England, *formed the almost exclusive basis of the work.*”<sup>350</sup> For more than 100 years, “thousands upon thousands of lawyers and influential laymen on both sides of the Atlantic read Blackstone’s *Commentaries* and believed them.”<sup>351</sup>

## 2. Christopher Columbus Langdell and the Case Law System

The first factor facilitating the transition from Blackstone’s natural law jurisprudence to Hart’s positivism is the abandonment of Blackstone’s *Commentaries* in the study of law. American legal education began its abandonment of Blackstone in 1871 when Christopher Columbus Langdell, the new dean of the Harvard Law School, published the first casebook, *Selection of Cases on the Law of Contracts*.<sup>352</sup> Langdell’s casebook marks the beginning of the “case law system,” which soon became the exclusive and universal method of study in American law schools. Rather than reading treatises, law students now read and analyze case opinions selected by their professors. Rather than giving lectures, law professors now question their students during class.

The case law system abandons Blackstone’s vision of law. Blackstone presents law as a coherent and cohesive system, continuously refined in the crucible of practical experience since the twelfth century. Blackstone originates law in reason, empowers law through autonomy, and

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<sup>349</sup> Abraham Lincoln, letter to James T. Thornton, 2 Dec. 1858, Roy P. Basler, ed., *Abraham Lincoln: His Speeches and Writings* (New York: Da Capo Press, 1990) 485.

<sup>350</sup> Josef Redlich, *The Common Law And The Case Method In American University Law Schools*, (Boston: Marymount Press, 1914) 7 [emphasis added].

<sup>351</sup> Grant Gilmore, *The Ages of American Law* (New Haven: Yale UP, 1977) 5.

<sup>352</sup> Christopher Columbus Langdell, *Selection of Cases on the Law of Contracts* (New York: Little, Brown and Co., 1879).

justifies law by consent.

The case law system, on the other hand, presents law as a collection of technical rules utilized for resolving disputes in a disjointed selection of unrelated cases. Casebooks are not treatises. The court opinions they contain are highly edited to remove all but the facts of the case and the specific rule of law required to resolve the dispute. The case law system removes Blackstone's jurisprudential framework for law, but it provides no substitute.

Students in the case law system learn that laws are merely rules for governing behavior and resolving disputes, exactly as Hart's model of law as a "union of primary and secondary rules" describes them. Law students retain this view of law as a disjointed set of technical rules when they take their places as lawyers, judges, and law professors.

The exclusion of Blackstone's *Commentaries* from the American legal curriculum for more than a century has significantly reduced its influence on the profession. Although an increasing number of scholars are rediscovering its merits,<sup>353</sup> opponents of Blackstone have

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<sup>353</sup> See Albert W. Altschuler, "Rediscovering Blackstone," *U. Penn. L. Rev.* 145 (1) (1996): 1-55; Richard Posner, "Blackstone and Bentham," *J. Law and Econ.* 19 (3) (1996): 569-606; Howard L. Lubert, "Sovereignty and Liberty in William Blackstone's *Commentaries on the Laws of England*," *Rev. Pol.* 72 (2010): 271-297; and William S. Brewbaker, III., "Reconsidering Blackstone's Declaratory Theory," *J. of Law & Rel.* 22 (1) (2006): 255-86. Howard Lubert writes, "alternative and more sympathetic treatments [of the *Commentaries*] are now ascendant." Howard L. Lubert, "Sovereignty and Liberty in William Blackstone's *Commentaries on the Laws of England*," *Rev. Pol.* 72 (2010): 271-297, 273-74. Lubert references the following authorities as examples. Gerald Stourzh demonstrates Blackstone's importance in American revolutionary thought, particularly in 1775-1776, concluding that the jurist was a "Conservative Whig" who believed in the popular right of revolution. Gerald Stourzh, "William Blackstone: Teacher of Revolution," *Jahrbuch für Amerikanstudien* 15 (1970): 184-200, 198. Another sympathetic treatment of Blackstone's use of the natural law is found in John N. Finnis, "Blackstone's Theoretical Intentions," *Natural Law Forum* 12 (1967): 163-83. More recently, scholars like David Lieberman, Michael Zuckert, and Paul Carrese have likewise sought to rescue Blackstone from the charge that his *Commentaries* are a confused and contradictory treatise that ultimately stands at odds with liberal political thought. For Lieberman, Blackstone wrote the *Commentaries* not as an endorsement of legislative omnipotence but rather to improve legislators' understanding of the common law and thus to "preserve the strengths of England's system of law from the [frequent and incautious] violations of its acknowledged constitutional masters," namely, Parliament. David Lieberman, "Blackstone's Science of Legislation," *Journal of British Studies* 27 (1988): 142. But in Lieberman's view, Blackstone's desire to protect the constitution from "incautious" legislation did not detract from his goal of promoting legal reform. Michael Lobban also finds Blackstone to be less conservative in his intentions, arguing that his effort to reconcile the common law with Roman (Institutional) jurisprudence was ultimately unsuccessful and led commentators to

subjected the *Commentaries* to poor scholarship and mischaracterization since the early twentieth century. During this time, “misperceptions of Blackstone’s view of natural law have reinforced the other misperceptions.”<sup>354</sup> Chicago law professor Albert Altschuler lists four mischaracterizations that he describes as “unfair” and “crude parodies” of Blackstone.<sup>355</sup> These misperceptions have further lowered Blackstone’s influence in contemporary jurisprudence.

#### **D. The Rise of Value Skepticism in American Jurisprudence**

The second factor facilitating the transition from Blackstone’s natural law jurisprudence to Hart’s legal positivism is the trend towards value skepticism in American jurisprudence.<sup>356</sup> In

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misconstrue his project as fundamentally conservative. Michael Lobban, “Blackstone and the Science of Law,” *The Historical Journal* 30 (2) (1987): 311–35; *see also* J. W. Cairns, “Blackstone, an English Institutist: Legal Literature and the Rise of the Nation State,” *Oxford Journal of Legal Studies* 4 (1984): 318–60; Duncan Kennedy, “The Structure of Blackstone’s *Commentaries*,” *Buffalo L. Rev.* 28 (1979): 209–382; Alan Watson, “The Structure of Blackstone’s *Commentaries*,” *Yale L. J.* 97 (5) (1988): 795–821. In Zuckert’s view, Blackstone “is as much a social compact thinker as Hobbes or Locke,” but Blackstone seeks to reinterpret the common law so that it meets the standard of consent. This “amalgam” of liberal political philosophy and customary law “is not the least bit incoherent” and reflects Blackstone’s aim to answer some of the criticisms inherent in social contract theory. Michael Zuckert, “Social Compact, Common Law, and the American Amalgam: The Contribution of William Blackstone,” *The American Founding and the Social Compact*, ed. Ronald J. Pestritto and Thomas G. West (Lanham, MD: Lexington Books, 2003), 56, 64. For another important treatment that sees Blackstone as attempting to reconcile liberal political theory and the common law, see James Stoner Jr., *Common Law and Liberal Theory: Coke, Hobbes and the Origins of American Constitutionalism* (Lawrence, KS: University Press of Kansas, 1992). Carrese, too, rejects the view of Blackstone as “an advocate of pure legal positivism and simple parliamentary supremacy” and as an opponent of constitutional reform. Blackstone’s “Gothic” or common-law constitutional jurisprudence was liberal and reformist but also subtle and complex; at its heart lay a judicial power “as the moderating, tempering element that ensures individual liberty and tranquility [within] a complex constitutionalism of separated powers.” Paul O. Carrese, *The Cloaking of Power: Montesquieu, Blackstone, and the Rise of Judicial Activism* (Chicago: University of Chicago Press, 2003), 134, 150.

<sup>354</sup> Albert W. Altschuler, “Rediscovering Blackstone,” *U. Penn. L. Rev.* 145 (1) (1996): 1-55, 18.

<sup>355</sup> Albert W. Altschuler, “Rediscovering Blackstone,” *U. Penn. L. Rev.* 145 (1) (1996): 1-55, 18. The first mischaracterization is that Blackstone envisions law as a “brooding omnipresence” from which judges must deduce timeless answers to *every* legal question. The second mischaracterization is that Blackstone is a rights-zealot, particularly regarding property rights. The third mischaracterization erroneously characterizes Blackstone holding that judges may never innovate nor improve the law. The final mischaracterization is that Blackstone exalts individual self-interest to the detriment of the community. Altschuler’s article successfully rebuts each mischaracterization.

<sup>356</sup> This is a term coined by University of Chicago law professor Albert Altschuler, a leading critic of this trend. *See* Albert Altschuler, “Rediscovering Blackstone,” *U. Penn. L. Rev.* 145 (1) (1996): 1-55; “The Descending Trail: Holmes’ ‘Path of the Law’ One Hundred Years Later,” *Fla. L. Rev.* 49 (3) (1997): 353-

addition to Christopher Columbus Langdell, notable figures contributing to this trend include Roscoe Pound, Justice Oliver Wendell Holmes, Jr., and Justice Learned Hand. Langdell and Pound dramatically influenced American legal education. Holmes and Hand significantly influenced American case law.

### 1. Pound's "Sociological Jurisprudence"

Langdell served as Dean of Harvard Law School from 1870-1895 and transformed American legal education as described above. Roscoe Pound also served as Dean of Harvard Law School, from 1916 to 1936. Pound's "sociological jurisprudence" made three significant departures from Blackstone's jurisprudence.

Pound's first departure was the suppression of individual rights in favor of the interests of society as a whole.<sup>357</sup> Such rights include Blackstone's natural rights to personal security, personal liberty, and private property. Pound's second departure was a marginalization of the significance of the procedure followed in reaching a case decision.<sup>358</sup> American practice considers the legal process to be as important as the result. Lon Fuller's "internal procedural morality" reflects this tradition.<sup>359</sup> Pound considered this focus on procedure to be overly

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420; and *Law without Values: The Life, Work, and Legacy of Justice Holmes* (Chicago: U of Chicago P, 2000).

<sup>357</sup> See generally Roscoe Pound, "Do We Need a Philosophy of Law?" *Colum. L. Rev.* 5 (3) (1905): 338-353; Roscoe Pound, "The Need for a Sociological Jurisprudence," *Green Bag* 19 (1907): 607; Roscoe Pound, "Mechanical Jurisprudence," *Colum. L. Rev.* 8 (3) (1908): 605-623; Roscoe Pound, "The Purpose and Scope of Sociological Jurisprudence," *Harv. L. Rev.* 24 (8) (1911): 591-611 and *Harv. L. Rev.* 25 (2) (1911): 140-168; Roscoe Pound, "Legislation as a Social Function," 18 (6) *Am. J. Socio.* 755-768 (1913); Roscoe Pound, "Interests of Personality," *Harv. L. Rev.* 28 (4) (1915): 343-365; Roscoe Pound, "A Theory of Social Interests," *Papers and Proceedings of the American Sociological Society* 15 (1921): 16-45, revised as Roscoe Pound, "A Survey of Social Interests," *Harv. L. Rev.* 57 (1) (1943): 1-39; Roscoe Pound, "A Survey of Public Interests," *Harv. L. Rev.* 58 (7) (1945): 909-929. See also Terry di Filippo, "Pragmatism, Interest Theory and Legal Philosophy: The Relation of James and Dewey to Roscoe Pound," *Trans. of the Charles S. Peirce Soc.* 24 (4) (1988): 487-509.

<sup>358</sup> Roscoe Pound, "Mechanical Jurisprudence," *Colum. L. Rev.* 8 (3) (1908): 605-623.

<sup>359</sup> Fuller sets out eight principles in *The Morality of Law* that constitute existence conditions for law. Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964). Fuller presents his principles through the literary device of King Rex, a well-intentioned but incompetent king who violates these

“contentious.” Instead, courts should decide cases based on the consequences of the legal decision for all of society. Pound thus called for “*a jurisprudence of ends*” that narrows the focus of law to obtaining results that benefit society as a whole.

Pound’s third departure from Blackstone was the abandonment of the common law system of case law and precedent,<sup>360</sup> which Pound maintained was “mechanically” applied.<sup>361</sup> Pound advocated the abandonment of common law and the adoption of a civil code system, drawing unfavorable comparisons between the American common law system and the German Civil Code of 1896.<sup>362</sup> The abandonment of common law advocated by Pound eviscerates the entirety of Blackstone’s natural law jurisprudence.

## 2. Holmes’ “Law without Values”

Justice Oliver Wendell Holmes, Jr. (1841-1935) is the most significant jurist in the trend

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principles in formulating his laws. Each violation produces adverse consequences. These eight principles include: (P1) The rules must be expressed in general terms in a manner that guarantees due process. (Criminal laws, for example, must give fair warning of the prohibited conduct). (P2) The rules must be publicly promulgated. (P3) The rules must be prospective in effect. (P4) The rules must be expressed in understandable terms. (P5) The rules must be consistent with one another. (P6) The rules must not require conduct beyond the powers of the affected parties. (P7) The rules must not be changed so frequently that the subject cannot rely on them. (P8) The rules must be administered in a manner consistent with their wording. Fuller also argues that because an evil legal system would have difficulty incorporating these eight principles, these procedural principles of internal morality constrain the substantive norms of a system. Lon L. Fuller, “Positivism and Fidelity to Law — A Reply to Professor Hart,” *Harv. L. Rev.* 71 (4) (1958) 630–672, 661. Hart vigorously challenges Fuller’s position. H.L.A. Hart, “Review of *The Morality of Law*” *Harv. L. Rev.* 78 (4) 1281-1313 (1965).

<sup>360</sup> Blackstone’s “declaratory theory” of law views *precedent* as a source of law, and is highly analogous to the common law’s view of *custom* as a source of law. Both precedent and custom are in turn subject to a requirement of “reasonableness,” which permits unreasonable precedents or customs to be set aside when necessary. Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge: Harvard UP, 2003) 274-75.

<sup>361</sup> Roscoe Pound, “Do We Need a Philosophy of Law?” *Colum. L. Rev.* 5 (3) (1905): 338-353.

<sup>362</sup> Roscoe Pound, “Mechanical Jurisprudence,” *Colum. L. Rev.* 8 (3) (1908): 605-623. By “mechanical jurisprudence,” Pound refers to the determination of case outcomes by previous precedents rather than consideration of the consequences of the case for society as a whole.

towards value skepticism in American jurisprudence.<sup>363</sup> For Holmes, “nearly every assertion of values beyond personal or, at most, class self interest was pretense, and just about every ethical question could be reduced to an issue of dominance, power, death, and survival.”<sup>364</sup> Human rights to Holmes signified nothing more than what “a given crowd will fight for.”<sup>365</sup> Holmes also remarked that people will fight for their rights just as a “dog will fight for his bone.”<sup>366</sup>

#### **a. Holmes’ Skepticism**

Holmes was an admitted value skeptic. “[W]hile one’s experience thus makes certain preferences dogmatic for oneself,” he wrote, “recognition of how they came to be so leaves one able to see that others, poor souls, may be equally dogmatic about something else. And this again means skepticism.”<sup>367</sup>

Holmes was also skeptical regarding truth. “Our test of truth is a reference to either a present or an imagined future majority in favor of our view.”<sup>368</sup> Truth is only “the majority vote of that nation that could lick all others.”<sup>369</sup> Holmes equates both “the philosopher’s effort to prove that truth is absolute” and “the jurist’s search for criteria of universal validity which he collects under the head of natural law” with “the poor devil” who has no other way of satisfying his “demand for the superlative” other than “by getting drunk.”<sup>370</sup> Like many appellate judges,

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<sup>363</sup> See Albert Altschuler, *Law without Values: The Life, Work, and Legacy of Justice Holmes* (Chicago: U of Chicago P, 2000), and Albert Altschuler, “The Descending Trail: Holmes’ ‘Path of the Law’ One Hundred Years Later,” *Fla. L. Rev.* 49 (3) (1997): 353-420.

<sup>364</sup> See Albert Altschuler, *Law without Values: The Life, Work, and Legacy of Justice Holmes* (Chicago: U of Chicago P, 2000) 6.

<sup>365</sup> Oliver Wendell Holmes, Jr., Letter to Harold Laski, July 23, 1925. *The Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski, 1916-1935*, ed. Mark DeWolfe Howe, vol. 1 (Cambridge: Harvard UP, 1953) 761-62.

<sup>366</sup> Oliver Wendell Holmes, Jr., “Natural Law,” *Harv. L. Rev.* 32 (1) (1918): 40-44, 42.

<sup>367</sup> Oliver Wendell Holmes, Jr., “Natural Law,” *Harv. L. Rev.* 32 (1) (1918): 40-44, 41.

<sup>368</sup> Oliver Wendell Holmes, Jr., “Natural Law,” *Harv. L. Rev.* 32 (1) (1918): 40-44, 40.

<sup>369</sup> Oliver Wendell Holmes, Jr., “Natural Law,” *Harv. L. Rev.* 32 (1) (1918): 40-44, 40.

<sup>370</sup> Oliver Wendell Holmes, Jr., “Natural Law,” *Harv. L. Rev.* 32 (1) (1918): 40-44, 40.

Holmes rejects Blackstone's prohibition against judge-made law.<sup>371</sup>

#### **b. Holmes' "The Path of the Law"**

Holmes essay "The Path of the Law"<sup>372</sup> makes four significant contributions to value skepticism in American jurisprudence. The first contribution involves purging all "moral significance" and "ethical associations" from the law. "For my own part, I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether. . . . We should lose the fossil records of a good deal of history and the majesty got from ethical associations, but by ridding ourselves of an unnecessary confusion we should gain very much in the clearness of our thought."<sup>373</sup>

Holmes' second contribution to value skepticism is Holmes' "prediction theory" of law. The prediction theory reduces all legal concepts to "nothing more" than predictions of case outcomes. Values play no role in law. As Holmes writes, "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."<sup>374</sup> "The primary rights and duties with which jurisprudence busies itself again are nothing but prophecies... a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court; - and so of a legal right."<sup>375</sup>

Holmes' third contribution to value skepticism is the "bad man" perspective on law. The bad man perspective strips law of all values. "If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such

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<sup>371</sup> *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917): "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from Moeller to molecular motions."

<sup>372</sup> Oliver Wendell Holmes, Jr., "The Path of the Law," *Harv. L. Rev.* 110 (5) (1997): 991-1009.

<sup>373</sup> Oliver Wendell Holmes, Jr., "The Path of the Law," *Harv. L. Rev.* 110 (5) (1997): 991-1009, 997.

<sup>374</sup> Oliver Wendell Holmes, Jr., "The Path of the Law," *Harv. L. Rev.* 110 (5) (1997): 991-1009, 994.

<sup>375</sup> Oliver Wendell Holmes, Jr., "The Path of the Law," *Harv. L. Rev.* 110 (5) (1997): 991-1009, 991-92.

knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.”<sup>376</sup> Good and bad have no meaning in the law other than indicating a favorable or unfavorable outcome. “But what does it mean to a bad man?” asks Holmes. “Mainly, and in the first place, a prophecy that if he does certain things he will be subjected to disagreeable consequences by way of imprisonment or compulsory payment of money.”<sup>377</sup> Hart’s positivism adopts the “bad man” perspective as the “external point of view.”<sup>378</sup>

Holmes’ fourth contribution to value skepticism is his rejection of ethical obligations in the law of contracts. “Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract. . . . The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, - and nothing else.”<sup>379</sup> Holmes’ rejection of an ethical obligation to honor one’s contracts is noteworthy in that it violates all three of the fundamental precepts of natural law that Blackstone adopts from the *Institutes of Justinian*: “that we should live honestly, should hurt nobody, and should render to every one his due; to which three general precepts Justinian has reduced the whole doctrine of law.”<sup>380</sup> Natural law jurisprudence considers breach of contract to be dishonest, injurious to the other parties to the

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<sup>376</sup> Oliver Wendell Holmes, Jr., “The Path of the Law,” *Harv. L. Rev.* 110 (5) (1997): 991-1009, 993.

<sup>377</sup> Oliver Wendell Holmes, Jr., “The Path of the Law,” *Harv. L. Rev.* 110 (5) (1997): 991-1009, 994.

<sup>378</sup> Hart’s *external point of view* is the view of a person who feels no obligation that he “should” follow the law. H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 56. This person has no sense that it is “right” to follow the law or that it is “wrong” not to do so, and refuses to look upon the law as a standard of conduct for himself or others. *Id.* The external point of view is present in people engaging in mere “social habits” and “group habits.” Hart defines such habits as regular, uniform behavior that occurs without the pressure of a social rule mandating that behavior “in the normative terminology of ‘ought’, ‘must’, and ‘should’, ‘right’, and ‘wrong’.” *Id.* at 56, 57.

<sup>379</sup> Oliver Wendell Holmes, Jr., “The Path of the Law,” *Harv. L. Rev.* 110 (5) (1997): 991-1009, 995.

<sup>380</sup> *The Institutes of Justinian*, trans. J.B. Moyle, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1889) 2, 3. Blackstone expressly adopts these three precepts. Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 27. The admonition to “live *honestly*” is better translated as “live *honorably*.”



contract, and a denial of the other parties' due.

### 3. Learned Hand's Rejection of the Bill of Rights

Justice Learned Hand (1872-1961) of the Second Circuit Court of Appeals also made a significant contribution to value skepticism in American jurisprudence by rejecting the values incorporated within the Bill of Rights. Hand was a moral relativist who considered moral values to be the product of their times and primarily a matter of taste.<sup>381</sup> Hand adopted the positivist denial of the existence of any natural rights, including those incorporated in the United States Constitution.<sup>382</sup>

Hand denied that the Bill of Rights constituted law at all. He viewed the Bill of Rights as nothing more than a set of "admonitory principles" designed to ensure the fair exercise of constitutional powers.<sup>383</sup> Hand denounced overturning legislation on the basis that it violated the Bill of Rights, and he publicly advocated the removal of the Bill of Rights from the Constitution.<sup>384</sup>

Hand's rejection of the Bill of Rights is noteworthy because it repudiates both the principle of autonomy and the principle of consent that underlie natural law jurisprudence. The Bill of Rights, like its model the English Bill of Rights of 1689,<sup>385</sup> exemplifies the principles of autonomy and consent that emerged from the constitutional struggles in seventeenth century

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<sup>381</sup> Kathryn Griffith, *Judge Learned Hand and the Federal Judiciary*, (Norman: OK U. P., 1973) vii.

<sup>382</sup> Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford: Oxford U P, 1996), 342.

<sup>383</sup> Kathryn Griffith, *Judge Learned Hand and the Federal Judiciary*, (Norman: OK U. P., 1973) 130-138.

<sup>384</sup> Kathryn Griffith, *Judge Learned Hand and the Federal Judiciary*, (Norman: OK U. P., 1973) 130-138. Hand regarded the advancement of civil liberties as a task for the legislature, not the courts. Marvin Schick, *Learned Hand's Court*, (Baltimore: Johns Hopkins P, 1970) 355. In his 1958 Holmes Lectures at Harvard Law School, he challenged the constitutionality of the Warren Court's civil rights rulings, including the unanimous decision in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). The lectures were published as Learned Hand, *The Bill of Rights* (Cambridge, MA: Harvard U P, 1958).

<sup>385</sup> Carl Stephenson and Frederick George Marcham, "The Bill of Rights (1689)," *Sources of English Constitutional History* (New York: Harper & Row, 1937) 599-602.

England. The Bill of Rights establishes the principle of autonomy by establishing the supremacy of law over political rulers, ensuring that ruler and ruled are governed by the same rules of law, and preventing arbitrary changes in the law. The Bill of Rights exemplifies the principle of consent in that ratification of the United States Constitution succeeded only after its supporters amended the Constitution to include the Bill of Rights as its first ten amendments.

### **E. The Influence of Analytic Philosophy in the Academy**

The third factor facilitating the transition from Blackstone's natural law jurisprudence to Hart's legal positivism is the broad influence of analytic philosophy in American universities and law schools. Hart was an analytic philosopher and legal positivism is analytic in methodology. One of the distinct doctrines of Hart's positivism is the "important truth" that "a study of the meaning of the distinctive vocabulary of the law is as vital to our understanding of the nature of law as historical or sociological studies."<sup>386</sup> Hart justifies the "separation of law and morality," the unrestricted validity of morally iniquitous laws, as an analytical aid,<sup>387</sup> ignoring the practical consequences of such a separation.

Analytic philosophy dominates the American philosophical community. Brian Leiter writes that "in the U.S., *all* the Ivy League universities, *all* the leading state research universities, *all* the University of California campuses, most of the top liberal arts colleges, most of the flagship campuses of the second-tier state research universities boast philosophy departments

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<sup>386</sup> H. L. A. Hart, "Positivism and the Separation of Law and Morals," *Harv. L. Rev.* 71 (4) (1958): 593–629, 601 (1958). "We must remember that the Utilitarians combined with their insistence on the separation of law and morals two other equally famous but distinct doctrines. One was the important truth that a purely analytical study of legal concepts, a study of the meaning of the distinctive vocabulary of the law, was as vital to our understanding of the nature of law as historical or sociological studies, though of course it could not supplant them."

<sup>387</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 211. Hart argues that the refusal to recognize evil laws as valid is "too crude a way [to deal] with delicate and complex moral issues. The concept of law which allows the invalidity of law to be distinguished from its immorality, enables us to see the complexity and variety of these separate issues; whereas a narrow concept of law which denies legal validity to iniquitous rules may blind us to them."

that *overwhelmingly* self-identify as ‘analytic:’ it is hard to imagine a ‘movement’ that is more academically and professionally entrenched than analytic philosophy.”<sup>388</sup> Since analytic philosophers share the methodology of legal positivism, it follows that they are receptive to the tenets generated by those methods.

## **F. Legal Positivism and Judicial Power**

The fourth factor facilitating the transition from Blackstone’s natural law jurisprudence to Hart’s legal positivism is the desire of many judges to “make” new law, which Blackstone’s jurisprudence prohibits.<sup>389</sup> Famous judges through history have chafed at limitations on their power, from Sir Edward Coke through Holmes through Richard Posner today. Hart’s positivism liberates judges from this limitation. As seen in the below discussion of *Griswold v. Connecticut*,<sup>390</sup> positivism gives judges virtually unlimited power to set aside statutes without regard to the anti-democratic effect of their rulings. Many appellate judges therefore embrace legal positivism.

### **1. Blackstone Limits Judicial Power**

Under Blackstone’s “declaratory theory” of law, the role of judges is not to “make” law, but rather to “find” law in the received legal tradition and “declare them.” This “declaratory theory” of law views *precedent* as a source of law, and is highly analogous to the common law’s

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<sup>388</sup> Brian Leiter, “‘Analytic’ and ‘Continental’ Philosophy,” *The Philosophical Gourmet Report 2009*, 7 July 2011 (<http://www.philosophicalgourmet.com/analytic.asp>).

<sup>389</sup> Blackstone’s limits on judicial discretion reflect the Puritan emphasis on the sinfulness of all persons, including the judge himself, which Blackstone adopts from Sir Matthew Hale’s groundbreaking work on the common law of England. Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge: Harvard UP, 2003) 265, 296-97. See Matthew Hale, *The Analysis of Law: A Scheme or Abstract of the Several Titles and Partitions of the Law of England, Digested into Method* (London: Nutt, 1716).

<sup>390</sup> *Griswold v. Connecticut*, 281 U.S. 479 (1965).

view of *custom* as a source of law.<sup>391</sup> Blackstone justifies his theory on the lessons of history.

In Blackstone's view, judge-made law unites the power to *make* and *enforce* law in one body, and this invites tyranny.<sup>392</sup> These powers achieved *de facto* unification during the Stuart monarchies through the Crown's power to appoint and dismiss judges at will. The result of this unification was a highly politicized judiciary that produced a series of result-oriented decisions. These decisions denied long-standing and generally accepted principles of law in order to facilitate the royal will.<sup>393</sup>

These cases disregarded the fundamental principles of autonomy of law and consent of the governed. They wreaked havoc in England by eroding public confidence, both in the

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<sup>391</sup> Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge: Harvard UP, 2003) 274-75.

<sup>392</sup> Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 105: "In all tyrannical governments, the supreme magistracy, or the right of both *making* and of *enforcing* the laws, is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty. The magistrate may enact tyrannical laws, and execute them in a tyrannical manner, since he is possessed, in quality of dispenser of justice, with all the power which he, as legislator, thinks proper to give himself."

<sup>393</sup> These cases include the following. *Bates' Case* (1606) upheld James I's impositions of tunnage and poundage without Parliamentary consent. Carl Stephenson and Frederick George Marcham, "Bates' Case (1606)," *Sources of English Constitutional History* (New York: Harper & Row, 1937) 435-37. The *Case of the Five Knights* (1627) upholding Charles I's forced loans by denying habeas corpus and permitting the indefinite imprisonment of English subjects without charges and without bail. Carl Stephenson and Frederick George Marcham, "The Case of the Five Knights (1627)," *Sources of English Constitutional History* (New York: Harper & Row, 1937) 457-58. *Hampden's Case* (1636), upheld Charles I's inland levies of ship money during peacetime without Parliamentary consent. Carl Stephenson and Frederick George Marcham, "The King v. John Hampden (1638)," *Sources of English Constitutional History* (New York: Harper & Row, 1937) 459-62. *Godden v. Hales* (1686) upheld the king's dispensing power to disregard any penal statute at his pleasure. Carl Stephenson and Frederick George Marcham, "Godden v. Hales (1686)," *Sources of English Constitutional History* (New York: Harper & Row, 1937) 582-83. Furthermore, the creation and application of a rule of law in the same case violates the provision against *ex post facto* laws. Alexander Hamilton adopts Blackstone's view in The Federalist No. 78. Hamilton writes that the judiciary "may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." Hamilton, Alexander, James Madison, and John Jay, *The Federalists on the New Constitution* (New York: Putnam, 1904) 483.

judiciary<sup>394</sup> and in the government as a whole. As described in Chapter I, their disregard of autonomy and consent catalyzed two revolutions, including seven years of civil war.

## 2. Positivism's "Penumbra Doctrine" Removes Blackstone's Limits

Contrary to Blackstone, legal positivism regards judicial law making as both ordinary and appropriate in most cases. Hart disregards Blackstone's historical approach and justifies his position on linguistic grounds. Laws, Hart argues, consist of rules that can determine results only at the core of their meaning. Outside this core of meaning, legal terms present a "penumbra of uncertainty" at "the fringe of their meaning." This "uncertainty at the borderline" of meaning gives law an "open texture."<sup>395</sup> According to Hart, only the judge's discretion can resolve this uncertainty. Hart therefore expressly rejects "the tradition that judges 'find' and do not 'make' law."<sup>396</sup>

## 3. Application of the Penumbra Doctrine in *Griswold v. Connecticut*

Justice Douglas famously applied Hart's "penumbra" doctrine in *Griswold v.*

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<sup>394</sup> By 1688, the twelve members of the higher judiciary were considered incompetent to render legal advice. Thomas Macaulay, *The History of England from the Ascension of James II* (New York: Harper, 1849) 380.

<sup>395</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 128: "Whichever device, precedent or legislation, is chosen for the communication of standards of behavior, these, however smoothly they work over the great mass of ordinary cases, will, at some point when their application is in question, prove indeterminate; they will have what has been termed an *open texture*. So far we have presented this, in the case of legislation, as a general feature of human language; uncertainty at the borderline is the price to be paid for the use of general classifying terms in any form of communication concerning matters of fact."

<sup>396</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 12. This tradition was adopted by Blackstone from the legal treatises of Sir Matthew Hale. Under Blackstone's "declaratory theory" of law, the role of judges is not to "make" law, but rather to "find" law in the received legal tradition and "declare them." This "declaratory theory" of law views *precedent* as a source of law, and is highly analogous to the common law's view of *custom* as a source of law. Both precedent and custom are in turn subject to a requirement of "reasonableness," which permits unreasonable precedents or customs to be set aside when necessary. Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge: Harvard UP, 2003) 274-75. "While Blackstone is always cited as the foremost exponent of the declaratory theory, a very similar view was stated by Sir Matthew Hale in his *History of the Common Law*, which was published 13 years before the birth of Blackstone. Gray, *Nature and Sources of the Law* 206 (1st ed. 1909)."

*Connecticut*, 281 U.S. 479 (1965). *Griswold* overturns two Connecticut statutes that prohibited contraception on the basis that they violated a “right of privacy.”<sup>397</sup> *Griswold* enforces the right to privacy, even though the majority opinion admits that the express language of the United States Constitution does not contain any such right.

Under a traditional Blackstonian analysis, the Supreme Court should apply the Constitution as written and ratified. Since the Constitution expressly lists other rights, the right of privacy is excluded from protection under the rule of *inclusio unius est exclusio alterius*.<sup>398</sup> The ratifiers of the Constitution chose not to protect a right of privacy, and the Connecticut statutes do not violate any Constitutional rights.

To overturn the Connecticut statutes, Justice Douglas had to make new law, and Hart showed him the way. Justice Douglas adopted Hart’s penumbra doctrine in deciding the case: “specific guarantees in the Bill of Rights have *penumbras*, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy.”<sup>399</sup>

Justice Black’s dissent argued that the majority justices were voiding validly enacted legislation “on the basis of their own appraisal of what laws are unwise or unnecessary. The power to make such decisions is of course that of a legislative body.”<sup>400</sup> The dissent echoes

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<sup>397</sup> Douglas describes the subject statutes as follows: “The statutes whose constitutionality is involved in this appeal are 53-32 and 54-196 of the General Statutes of Connecticut (1958 rev.). The former provides: “Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.” Section 54-196 provides: “Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.” 281 U.S. at 480.

<sup>398</sup> A rule of statutory interpretation that holds when if a list of rights is expressly given, all unlisted rights are excluded from the purview of the statute.

<sup>399</sup> 281 U.S. at 484. Emphasis added.

<sup>400</sup> “The due process argument which my Brothers HARLAN and WHITE adopt here is based, as their opinions indicate, on the premise that this Court is vested with power to invalidate all state laws that it considers to be arbitrary, capricious, unreasonable, or oppressive, or on this Court’s belief that a particular

Blackstone's view that judges have no legitimate power to substitute their judgment for the judgment of the people's legitimate representatives.<sup>401</sup>

#### 4. *Griswold's* Anti-Democratic Effect

This fundamental conflict regarding the power of judges to make new law continues to divide American jurisprudence. Since *Griswold*, the implied right of privacy has been invoked in cases involving the right to marry,<sup>402</sup> the right to an abortion,<sup>403</sup> the right to educate one's children,<sup>404</sup> the right to engage in homosexual conduct,<sup>405</sup> and the right to live together as a family.<sup>406</sup> Furthermore, the Supreme Court applies its *highest* level of review, "strict scrutiny," to statutes accused of violating the right to privacy.<sup>407</sup>

The *Griswold* opinion produces a troubling anti-democratic effect that transcends the

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state law under scrutiny has no 'rational or justifying' purpose, or is offensive to a 'sense of fairness and justice.' If these formulas based on 'natural justice,' or others which mean the same thing, are to prevail, they require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary. The power to make such decisions is of course that of a legislative body. Surely it has to be admitted that no provision of the Constitution specifically gives such blanket power to courts to exercise such a supervisory veto over the wisdom and value of legislative policies and to hold unconstitutional those laws which they believe unwise or dangerous." 281 U.S. at 511-12.

<sup>401</sup> Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 46-47. "For it is an established rule to abide by former precedents, where the same points come again in litigation: as well to keep the scale of justice even and steady, and not liable to waiver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws, and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one."

<sup>402</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>403</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>404</sup> *Runyon v. McCrary*, 427 U.S. 160 (1976)

<sup>405</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003) (*Griswold* cited, but the case is decided under the due process clause of the Fourteenth Amendment).

<sup>406</sup> *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

<sup>407</sup> *E.g., Zablocki v. Redhail*, 434 U.S. 374 (1978).

merits of the social issues involved in the case.<sup>408</sup> A jurisprudence that permits justices to create and enforce new rights admittedly *omitted* from the Constitution also permits justices to destroy and disregard established rights expressly *included* in the Constitution. The standard of meaning in both instances shifts from the ratified language of the Constitution to the will of the interpreting justice. Such interpretation destroys the autonomy of the Constitution and renders the consent of the governed irrelevant.

Such interpretation also violates Blackstone's warning against uniting the power to *make* law and the power to *enforce* law in the same body.<sup>409</sup> The cases discussed in the following chapters illustrate the effects that obtain when legal systems disregard the principles of autonomy and consent to unify the powers to *make* and *enforce* law in a single body.

#### **IV. The Need for a New Validity Standard and Philosophical Method**

##### **A. Natural Law and Legal Positivism are Irreconcilably Incompatible**

Natural law jurisprudence and legal positivism are irreconcilably incompatible for four reasons. The first incompatibility involves *the standard for legal validity*. The validity constraints of natural law demand that positive laws comply with the precepts of natural law. Legal positivism, however, denies the existence of natural law precepts. Bentham derides natural

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<sup>408</sup> In *Griswold*, five justices of a federal court overturned two validly enacted state statutes. The only ground for their action was that the statutes violated a putative right, a right the Constitution did not expressly contain. No one elects a federal judge. Federal judges are not subject to recall, and they do not have to run for reelection. Federal judges receive life appointments, and they bear no accountability for their case decisions.

<sup>409</sup> Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 105: "In all tyrannical governments, the supreme magistracy, or the right of both *making* and of *enforcing* the laws, is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty. The magistrate may enact tyrannical laws, and execute them in a tyrannical manner, since he is possessed, in quality of dispenser of justice, with all the power which he, as legislator, thinks proper to give himself."



law precepts as “imaginary,” “a perversion of language,” and “nonsense upon stilts.”<sup>410</sup>

Legal positivism requires only two conditions for legal validity. The first condition is that private citizens generally obey the primary rules of obligation, even if coercion is required to compel obedience. The second condition is that public officials adopt the rule of recognition as their “public standard of official behavior.”<sup>411</sup> Consequently, legal positivism accepts morally iniquitous laws as legally valid.<sup>412</sup>

The second incompatibility involves *the autonomy of law*. Law exercises autonomy under natural law jurisprudence by wielding supremacy over political rulers. Political rulers are subject to the same laws as the general population, and political rulers may not arbitrarily change or disregard the law to reflect their will. In de Bracton’s terms, “the laws make the king.” Legal positivism, on the other hand, denies the autonomy of law. Legal positivism founds law on the will of the political ruler.<sup>413</sup> Under legal positivism, “the king makes the laws.”

The third incompatibility involves *the consent of those subject to law*. Natural law jurisprudence holds that the legitimacy of law requires the consent of those under its power. Legal positivism, in contrast, rejects consent as a requirement for law. Austin, for example, posits law as the command of the sovereign backed by the threat of sanctions.<sup>414</sup> Hart holds that

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<sup>410</sup> Jeremy Bentham, “Anarchical Fallacies; Being an Examination of The Declarations of Rights Issued During the French Revolution,” *The Works of Jeremy Bentham*, vol. 2 (Edinburgh: William Tate, 1843) 407, 501.

<sup>411</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 116-17.

<sup>412</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 268.

<sup>413</sup> Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge: Harvard UP, 2003) 241.

<sup>414</sup> Jeremy Bentham, *Of Laws in General*, ed. H.L.A. Hart (London: Athlone Press, 1970), 1; John Austin, *The Province of Jurisprudence Determined*, (Amherst, NY: Prometheus, 2000) 14, 225-31.

the general population may be compelled to obey the law “from any motive whatsoever” and by any necessary sanction.<sup>415</sup>

The fourth incompatibility involves *philosophical methodology*. Natural law theory observes history and seeks to synthesize its lessons in a cohesive set of legal principles. Legal positivism rejects history as irrelevant and relies instead on linguistic analysis.<sup>416</sup> Legal positivism thus commits the philosophical fallacy.<sup>417</sup>

Legal positivism also separates law from its application by ignoring the consequences of applying its precepts.<sup>418</sup> Consequently, legal positivism gives an incomplete description of law. Furthermore, by considering only the issue of “*what law is*” and intentionally excluding the issue of “*what law ought to be*,”<sup>419</sup> legal positivism provides no pragmatic guidance to judges, lawyers, or juries engaged in the justice system.

## **B. Problems Created by Legal Positivism**

The growing acceptance of legal positivism creates two problems that work against the consistency, stability, and predictability of law. The first problem involves *the positivist acceptance of morally iniquitous laws* as legally valid and enforceable. Morally iniquitous laws permit, *inter alia*, the execution of innocent men.

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<sup>415</sup> John Austin, *The Province of Jurisprudence Determined*, (Amherst, NY: Prometheus, 2000) 14, 225-31; H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 117.

<sup>416</sup> Hart focuses on “*a purely analytical study of legal concepts, a study of the meaning of the distinctive vocabulary of the law*.” H. L. A. Hart, “Positivism and the Separation of Law and Morals,” *Harv. L. Rev.* 71 (4) (1958): 593–629, 601.

<sup>417</sup> John Dewey, “Context and Thought,” *The Later Works of John Dewey*, ed. Jo Ann Boydston, Vol. 6 (Carbondale, IL: S. Illinois UP, 1985) 5-7. Legal positivism disregards the historical and social context of law, yet still regards its narrow linguistic analysis as a complete, final, and sufficient analysis of law.

<sup>418</sup> John Dewey, “My Philosophy of Law,” *The Great Legal Philosophers*, ed. Clarence Morris (Philadelphia: U Penn P, 1959) 508. “Without application,” Dewey writes, “there are scraps of paper or voices in the air but nothing that can be called law.”

<sup>419</sup> H. L. A. Hart, “Positivism and the Separation of Law and Morals,” *Harv. L. Rev.* 71 (4) (1958): 593–629, 594.

The enforcement of “legal rights and duties which have no moral justification or force whatever”<sup>420</sup> foments disrespect for the law and motivates the citizenry to disobey the law on moral grounds. Coercion becomes necessary to enforce the law. Although legal positivism expressly approves of coerced obedience,<sup>421</sup> coerced obedience is inconsistent with a society based on ordered liberty and founded on the consent of the governed.

The second significant problem involves *the positivist acceptance of adjudication by judicial discretion*. Under natural law jurisprudence, *law wields supremacy over judges*. Judges perform a limited function, identifying existing legal rules and legal principles and applying those rules and principles to the facts. Judges act in a predictable manner consistent with pre-existing law. Judges should only *find* the law, not *make* it.<sup>422</sup>

The linguistic methodology of legal positivism, however, legitimizes broad judicial discretion. Under legal positivism, *judges wield supremacy over law*. In cases in which the meaning of the applicable legal rule is indeterminate or incomplete, the judge “must exercise his discretion and make law for the case instead of merely applying already pre-existing settled law.”<sup>423</sup>

Natural law judges resolve indeterminate or incomplete meanings of legal rules by applying a set of pre-existing interpretative principles. Legal positivism’s description of law, however, does not recognize the existence of such principles.<sup>424</sup> Legal positivism thus relies upon the discretion of the individual judge to supply the meaning.

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<sup>420</sup> H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Clarendon Press, 1994) 268.

<sup>421</sup> It is sufficient that each member of the population obeys the primary rules “for his part only” and “*from any motive whatsoever*.” H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 116 [emphasis added].

<sup>422</sup> Ronald Dworkin, “Judicial Discretion,” *The Journal of Philosophy* 60 (1963) 624-638.

<sup>423</sup> H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Clarendon Press, 1994), 272-276.

<sup>424</sup> Ronald Dworkin, “The Model of Rules,” *U. Chi. L. Rev.* 35 (1) (1967): 14-46, 23-24.

This reliance on individual judicial discretion creates its own series of significant problems. Case outcomes are increasingly determined, not by pre-existing law, but rather by the interpretation of the individual judge. The meaning of statutes or Constitutional provisions no longer reside in the objective meaning of the text, but rather in the subjective consciousness of the judge. Judges are susceptible to varying their interpretations to produce result-oriented decisions by a process of reverse legal reasoning. New interpretations created after the operative facts of the case violate the prohibition against *ex post facto* laws.

Legal positivism's acceptance of adjudication by judicial discretion erodes the consistency, stability and predictability of law. The combined acceptance of broad discretion and morally iniquitous laws produces unrestrained judicial discretion. Justice Richard Posner of the Seventh Circuit Court of Appeals describes the growing acceptance of broad judicial discretion as leaving "an enormous blank space in which the judge can inscribe *any decision he pleases*."<sup>425</sup> Posner even accepts the legitimacy of judicial discretion unsupported by *any* evidence. Posner concedes that adjudication by judicial discretion "will inevitably be based to a disquieting extent *on hunches and subjective preferences* rather than on hard evidence."<sup>426</sup>

Adjudication by judicial discretion is profoundly anti-democratic. It creates a juristocracy by allowing judges to decide matters of public policy without public input and without accountability to those affected by the decision. Adjudication by judicial discretion also allows judges to unilaterally change or invalidate statutory and Constitutional provisions through discretionary interpretations.

Adjudication by judicial discretion is also anathema to a constitutional democracy. It inevitably skews the selection of judicial candidates towards political litmus tests and away from

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<sup>425</sup> Richard A. Posner, "Legal Pragmatism," *Metaphilosophy* 35 (2004): 144-159, 149-50.

<sup>426</sup> Richard A. Posner, *Law, Pragmatism, and Democracy* (Cambridge: Harvard University Press, 2003) 126.

judicial qualifications based on training, ability, and temperament. The ultimate result of this process is the politicization of the Constitution. Justices interpret the Constitution, not by the objective meaning of its text, but by the political views of the prevailing majority that secured the justice's appointment. The Constitution consequently becomes unable to perform its primary function of protecting the minority within a democracy from the tyranny of the majority.

### **C. The Need for a New Approach**

The problems created by the positivist acceptance of *morally iniquitous laws* require the rejection of legal positivism's validity standard. The problems created by the positivist acceptance of *broad judicial discretion* require the rejection of legal positivism's linguistic methodology. A new approach to legal validity and a new philosophical method are required.

Natural law theory, unfortunately, is inadequate to the task for two reasons. Natural law theory adopts inconsistent views of human reason. It also fails to recognize the uncertainties inherent in basing its validity standard on divine law.

This dissertation therefore adopts a methodology, adapted from the philosophy of John Dewey, that evaluates legal principles by applying the experimental method to the effects and social consequences those legal principles produce.<sup>427</sup> This evaluation of legal principles focuses on the operations of law and the effects of these operations upon ongoing human activities.<sup>428</sup>

History is an essential feature of this method. Unless the past illuminates the future, the mind proceeds in shadows.<sup>429</sup> Legal history provides a long record of past experimentation with

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<sup>427</sup> John Dewey, "My Philosophy of Law," *The Great Legal Philosophers*, ed. Clarence Morris (Philadelphia: University Of Pennsylvania Press, 1959) 509-10.

<sup>428</sup> John Dewey, "My Philosophy of Law," *The Great Legal Philosophers*, ed. Clarence Morris (Philadelphia: University Of Pennsylvania Press, 1959) 508.

<sup>429</sup> Alexis de Tocqueville, *Democracy in America*, ed. Oliver Zunz, trans. Arthur Goldhammer (New York: Literary Classics, 2004) 519.

legal principles.<sup>430</sup> Applying this pragmatic methodology to legal history, this dissertation formulates a new standard of legal validity that overcomes the shortcomings of natural law theory and legal positivism.

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<sup>430</sup> John Dewey, *Human Nature and Conduct: An Introduction to Social Psychology* (New York: Random House, 1930) 221.

## CHAPTER III

### ATHENS AND THE TRIAL OF SOCRATES

“Don’t you see that the Athenian courts have often been prevailed upon by argument to put innocent men to death, and equally have often acquitted the wrongdoers, either out of pity aroused by the speeches or because they’ve been flattered?”

**Xenophon, *Socrates’ Defence*, c. 390 B.C.**

#### I. Political Instability and Athenian Law

The Athenian political system oscillated violently between tyranny, oligarchy, and democracy in the two centuries before Socrates’ trial. The legal system that emerged from this turmoil treated its citizens as means to political ends and not as ends in themselves. The Athenian legal system facilitated political prosecutions by forsaking the protections afforded by procedural and substantive due process. Consequently, Athenian law knowingly permitted the conviction and execution of the innocent. It also criminalized thought and expression.

The Athenian experience demonstrates that the principles of autonomy and consent, although necessary, are insufficient to formulate a viable standard of legal validity. A third principle, the principle of reason, is also required. At a minimum, the principle of reason must protect the minority within a democracy from the tyranny of the majority. It must also establish due process protections against convicting the innocent.

Three forms of prosecutions dominated political tactics in Socrates’ day. *Graphai* or public prosecutions permitted any Athenian to prosecute any other Athenian for violating the law. The trial of Socrates was a *graphe* prosecution for impiety (*asebeia*). *Ostrakismos* or ostracism permitted the exile and execution of any individual by the popular will. Ostracism denied its victims a trial and required no evidence of wrongdoing. *Eisangeliai* or impeachments permitted the bad faith prosecution and possible execution of any office holder or any citizen making a public proposal.

As demonstrated below, these proceedings violated the principles of reason, autonomy,

and consent. The political instability and the defeat of Athens in the Peloponnesian War was, in large part, a consequence of these political prosecutions. The rapid rise and fall of regimes in the political violence that accompanied Athens' defeat led in turn to the trial of Socrates, which earned Athens "the indelible reproach of decreeing to the same citizens the hemlock on one day and statues on the next."<sup>431</sup> Nevertheless, the Athenian legal system satisfied the requirements of legal positivism for a valid legal system.

Athenian political instability resulted from deeply seated regional and class antagonisms. From 632 B.C. until Socrates' trial in 399 B.C., Athens suffered through a series of regime changes that produced a succession of tyrannies,<sup>432</sup> oligarchies,<sup>433</sup> and democracies.<sup>434</sup> Each new regime sought to perpetuate its form of government. Tyrannies disarmed the populace and maintained power through force and terror. Oligarchic regimes sought to maintain power through the economic enslavement of the many. Democratic regimes responded by stripping the

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<sup>431</sup> Alexander Hamilton, John Jay, and James Madison, "Federalist No. 63," *The Federalist Papers*, ed. Ernest O'Dell (Sundown, TX: CreateSpace, 2010) 289.

<sup>432</sup> Tyrannies established or attempted include the attempted tyranny of Cylon in 632 B.C.; the tyranny of Pisistratus from 546-527 B.C.; the tyranny of Hippias and Hipparchus from 527-510 B.C., and the attempt of the deposed Hippias to reestablish his tyranny with the aid of the invading Persians in 490 B.C.

<sup>433</sup> The first oligarchy was the Council of the Areopagus, which established itself in the eleventh century B.C. The Oligarchy of the 400 displaced democracy in 411 B.C. after democratic mismanagement of the Sicilian Campaign and the political prosecution of Alcibiades during the Peloponnesian War created a military emergency. The Oligarchy of the 400 was replaced by the Oligarchy of the 5000 four months later. The 5000 were themselves displaced by a return to democracy four months later in 410 B.C. The Thirty Tyrants took power in 404 B.C. after Athens was defeated in the Peloponnesian war and ruled eight months before Athens restored democracy by armed uprising.

<sup>434</sup> Solon's constitution of 594 B.C. introduced the first elements of democracy. Pisistratus' tyranny supplanted democracy in 546 B.C. Athens remained under tyrants until 510 B.C. Cleisthenes introduced democratic reforms in 508 B.C., but the oligarchic Council of the Areopagus resumed control of the state in 480 B.C. after it orchestrated the Greek victory at Salamis. Ephialtes successfully limited the powers of the Council of the Areopagus in 462 B.C. and restored democratic government. From 462 B.C. to 406 B.C., political factions usurped the courts for political purposes with destabilizing effects. Democratic mismanagement of the Peloponnesian War resulted in the overthrow of democratic government. Oligarchy returned, first in the Oligarchy of the 400 in 411 B.C. and then in the Oligarchy of the 5000 later that same year. Athens restored democracy from 410-404 B.C., but the democracy again mismanaged the Peloponnesian War. Oligarchy returned after Athens' defeat in the rule of the Thirty Tyrants. An armed uprising restored democracy in 404 B.C., and a democratic regime was in power at the time of Socrates' trial in 399 B.C.



oligarchs of their property and expanding the franchise.

Regimes also sought to perpetuate their power by manipulating the laws. In only 160 years, from Athens' first legislator Draco in 621 B.C. to the radical democratic reformer Ephialtes in 462 B.C., Athens' constitution underwent four major reformatations.<sup>435</sup> These reforms gradually elevated the democratic heliastic courts (*heliaea*) and the general assembly (*ekklesia*) to political dominance while suppressing the aristocratic Council of 500 (*boule*) and the oligarchic Council of the Areopagus. These reforms also established the politically expedient *ostrakon*, *graphe*, and *eisangeliai* forms of action described below.

## II. The Athenian Legal System

### A. Draco's Ordinances Create a Political Crisis (621 B.C.)

Draco's ordinances of 621 B.C. extended the franchise to all who could furnish themselves with military equipment.<sup>436</sup> Draco's ordinances are famous for their severity, providing the death penalty for such minor offenses as idleness and stealing a cabbage. Plutarch writes that Draco's laws "were written not with ink, but blood."<sup>437</sup>

Draco's commercial ordinances created a class enmity that became a political crisis. Draco's laws permitted security interests in the person of the debtor. Lenders demanded this security as a standard practice, and default on a debt meant a life of servitude for the defaulting debtor. The consequence of these laws, writes Aristotle, was that "the land was in the hands of a few" and "the many were in slavery to the few."<sup>438</sup> The poorer classes became the serfs of the

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<sup>435</sup> These reformatations included the ordinances of Draco in 621 B.C.; the constitution of Solon in 594 B.C.; the democratic reforms of Cleisthenes in 508 B.C.; and the repeal of the powers of the Council of the Areopagus by Ephialtes in 462 B.C. See generally Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 6, 9, 27-29, and 34-37.

<sup>436</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 6.

<sup>437</sup> Plutarch, "Solon," *Plutarch's Lives of Illustrious Men*, trans. John Dryden (Boston: Little, Brown, 1880) 62-63.

<sup>438</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 7.

rich. “The hardest and bitterest part of the constitution in the eyes of the masses was their state of serfdom... to speak generally, they had no part or share in anything.”<sup>439</sup>

Regional factionalism added to the political discord. Those living within the hill district of the city favored democracy. Those living in the plains district favored oligarchy. Those living in the coastal district favored a mixed form of government. Each faction prevented the other from gaining the upper hand,<sup>440</sup> causing Athens to suffer “a continual state of internal disorder.”<sup>441</sup>

The people finally rose against the upper class. As Aristotle tells us, “the strife was keen, and for a long time the two parties were ranged in hostile camps against one another, till at last, by common consent, they appointed Solon to be their mediator and Archon.” The people gave Solon absolute power and “committed the entire constitution to his hands.”<sup>442</sup>

## **B. Solon Changes the Athenian Political Structure (594 B.C.)**

In order to ameliorate the class enmity crisis, Solon’s constitution introduced popular participation in the general assembly (*ekklesia*) and the heliastic courts (*heliaea*). Solon instituted four major reforms in the structure of Athenian government. First, because of the severity of Draco’s laws, Solon repealed all of them except those concerning homicide.<sup>443</sup> Second, Solon cancelled all debts, private and public, and prohibited the securing of any future

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<sup>439</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 3.

<sup>440</sup> Plutarch, “Solon,” *Plutarch’s Lives of Illustrious Men*, trans. John Dryden (Boston: Little, Brown, 1880) 60.

<sup>441</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 18. The oligarchic *Pedieis* residing in the plains district had the ability to grow grain, which gave them a political advantage during food shortages. The moderate *Paralioi* residing in the coastal district did not have the ability to grow grain. The democratic *Hyperakrioi* residing in the hill district were the poorest and least numerous faction.

<sup>442</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 7-9.

<sup>443</sup> Plutarch, “Solon,” *Plutarch’s Lives of Illustrious Men*, trans. John Dryden (Boston: Little, Brown, 1880) 62; Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 9.

debts with the persons of the debtor.<sup>444</sup> Third, Solon divided the citizens into four classes based on wealth.<sup>445</sup>

Solon's fourth reform changed the procedure for selecting magistrates (*archons*). Before Solon, the oligarchic Council of the Areopagus selected the *archons* with the effect that most of the *archons* came from a small number of families. Under Solon's reforms, each of the four tribes of Athens chose ten of its members by lot. A second lot selected nine of these forty candidates as *archons*.<sup>446</sup>

Solon's reformed government functioned through five organs. The nine *archons* managed the civic, military, and religious affairs of the city. The Council of the Areopagus, consisting of former *archons*, superintended the laws and served as the guardian of the constitution.<sup>447</sup> The Council of 400, consisting of 100 members from each of the four tribes, controlled all matters coming before the general assembly or *ekklesia*.<sup>448</sup> Membership in the *ekklesia* was open to every citizen.

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<sup>444</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 8. This measure was known as the *seisachtheia*, or "shaking off of burdens."

<sup>445</sup> Plutarch, "Solon," *Plutarch's Lives of Illustrious Men*, trans. John Dryden (Boston: Little, Brown, 1880) 62. The first class, the *Pentacosiomedimni*, consisted of those producing 500 measures of fruit or more per year. The second class, the *Hippida Teluntas* or horsemen consisted of those capable of keeping a horse or producing three hundred measures of fruit per year. The third class, the *Zeugitae* or yoked men (from the Greek word for "yoke"), consisted of those producing 200 measures of fruit per year. The fourth class, the *Thetes* or hired men, consisted of everyone else. Accord, Aristotle, *Politics*, trans. Benjamin Jowett (Toronto: Dover, 2000) 96; Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 9-10. Members of the top three classes were eligible to become *archons*. Members of the fourth class were ineligible to hold office, but they were eligible to participate as a member of the assembly and on the jury in the law courts. Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 10-11; Plutarch, "Solon," *Plutarch's Lives of Illustrious Men*, trans. John Dryden (Boston: Little, Brown, 1880) 62.

<sup>446</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 11.

<sup>447</sup> The Council of the Areopagus "watched over the affairs of the state in most of the more important matters, and corrected offenders, with full powers to inflict either fines or personal punishment." Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 11.

<sup>448</sup> Aristotle, *Politics*, trans. Benjamin Jowett (Toronto: Dover, 2000) 96. Membership on the Council of the 400 was limited to the top three classes,

Solon lastly established the *heliaea* or heliastic courts. These courts took their name from the fact that they conducted their proceedings “in the face of the sun.”<sup>449</sup> The *heliaea*, described in more detail in the discussion of Socrates' trial, selected its jurors (*dikastai*)<sup>450</sup> by lot from a volunteer pool of citizens aged thirty or older.<sup>451</sup> *Dikastai* means “those who have sworn,” a reference to the oath taken by each *dikast* before deciding a case.

Aristotle describes Solon's constitution as a mixture of political types that harmonized the different elements of the state. The Council of the Areopagus was oligarchic. The Council of 400 was aristocratic. The *ekklesia* and *heliaea* were democratic.<sup>452</sup>

### C. The Heliastic Courts (*Heliaea*)

Solon wished to grant the people at large only the minimum amount of power necessary to prevent their re-enslavement.<sup>453</sup> He intended that the oligarchic Council of the Areopagus and the aristocratic Council of 400 would serve as “anchors” that were “less liable to be tossed by tumult” than the *ekklesia*.<sup>454</sup> Nevertheless, the power of the *heliaea* eventually usurped the power of the oligarchic and aristocratic elements of the government. The *heliaea* ultimately became the center of power in the Athenian empire.

Three of Solon's reforms contributed to the political dominance of the *heliaea*. First, Solon permitted any citizen who felt himself aggrieved by the government to appeal directly to

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<sup>449</sup> G.H. Smith, *A Manual of Grecian Antiquities* (London: Priestly, 1832) 32.

<sup>450</sup> The *dikastai* differed from modern jurors and functioned like an audience at a debate. The *dikastai* combined the roles of the modern judge in interpreting law and the modern juror in finding facts. Adriaan Lanni, *Law and Justice in the Courts of Classical Athens* (Cambridge: Cambridge UP, 2006) 38.

<sup>451</sup> Robert J. Bonner, *Lawyers and Litigants in Ancient Athens* (New York: Benjamin Blom, 1969) 36-37. The selection of the *dikasts* was the responsibility of the *thesmothetae*, the six junior archons. *Id.* at 36. Aristotle gives a detailed description of the lottery process. Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 82-86.

<sup>452</sup> Aristotle, *Politics*, trans. Benjamin Jowett (Toronto: Dover, 2000) 96-97.

<sup>453</sup> Aristotle, *Politics*, trans. Benjamin Jowett (Toronto: Dover, 2000) 97.

<sup>454</sup> Plutarch, “Solon,” *Plutarch's Lives of Illustrious Men*, trans. John Dryden (Boston: Little, Brown, 1880) 62.

the *heliaea*. This reform vested supremacy in all governmental matters in the *heliaea*.<sup>455</sup> Aristotle writes that the institution of the appeal to the *heliaea* is the institution to which “the masses have owed their strength most of all, since, when the democracy is master of the voting-power, it is master of the constitution.”<sup>456</sup>

Second, the *heliaea* decided all disputes regarding the interpretation of Solon’s vaguely defined laws.<sup>457</sup> Solon failed to state his laws in “simple and explicit terms.” Consequently, disputes inevitably occurred regarding the application of the laws, and the *heliaea* resolved these disputes.<sup>458</sup> This power rendered the Council of the Areopagus’ traditional role as guardian of the laws and the constitution largely irrelevant.

Third, Solon created the *graphe* or “public” prosecution. This form of legal proceeding gave every Athenian citizen standing to bring almost any dispute to trial, as described below.<sup>459</sup>

#### **D. Solon Introduces the *Graphe* or “Public” Prosecution**

Prior to Solon's creation of the *graphe* or “public” prosecution, litigants were required to bring their cases in a *dike* or “private” prosecution. Only individuals who personally suffered a wrong had standing to bring a *dike*. An exception existed in homicide cases, in which the relatives of the deceased acted as the deceased's personal representatives.<sup>460</sup> Private actions included actions for breach of contract (*sunthekon parabaseos*), slander (*kakegorias*), assault

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<sup>455</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 12.

<sup>456</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 12.

<sup>457</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 12.

<sup>458</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 12.

<sup>459</sup> Peter Krentz, “The Athenian Government in Herodotus,” *The Landmark Herodotus: The Histories*, ed. Robert B. Strassler, trans. Andrea L. Purvis (New York: Anchor, 2007) 724.

<sup>460</sup> S.C. Todd, *The Shape of Athenian Law* (Oxford: Clarendon, 1993) 99.

(*aikias*), and theft (*klopes*).<sup>461</sup>

Solon's *graphai*, on the other hand, removed the standing requirement and permitted the victim *or any other citizen* to institute the action. The term for such third parties was *ho boulomenos*, literally “whoever wishes” to do so. Solon intended the *graphe* proceeding to offer protection for the weak in society.<sup>462</sup> The *graphe* proceeding also reflected the principle that some wrongdoings affected not only the wronged individual but also the public interest.<sup>463</sup> Any citizen should therefore have the right to prosecute on behalf of the state. He did so by laying a written charge (*graphe*) before the magistrate (*archon*).

Socrates’ trial involves a *graphe* prosecution for impiety (*asebias*). Other *graphai* proceedings included actions for mistreatment of parents and orphans (*kaboseos*), temple robbery (*hierosulias*), idleness (*argias*), male prostitution (*hetaireseos*) cowardice (*deilias*), and desertion (*astrateias*). Public officials were subject to prosecution for malfeasance in office such as accepting bribes (*doron*), malicious official behavior (*bouleuseos*), or refusing to submit accounts (*alogiou*).<sup>464</sup>

Proceedings before the *heliaea* lacked even basic due process protections. The governing laws were usually undefined. There were no judges, no meaningful rules of evidence, and the litigants had no right to counsel. Every case was determined on an *ad hoc* basis without regard to precedent. The *heliaea* decided even capital cases in the heat of a single sitting, and there was no appeal from their decisions.

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<sup>461</sup> G.H. Smith, *A Manual of Grecian Antiquities* (London: Priestly, 1832) 38. For a full listing of the twenty-eight known types of “private” actions or *dikai*, see S.C. Todd, *The Shape of Athenian Law* (Oxford: Clarendon, 1993) 102-05.

<sup>462</sup> Adriaan Lanni, *Law and Justice in the Courts of Classical Athens* (Cambridge: Cambridge UP, 2006) 35.

<sup>463</sup> Terry Buckley, *Aspects of Greek History: 750-323 B.C.* (London: Routledge, 2005) 75.

<sup>464</sup> G.H. Smith, *A Manual of Grecian Antiquities* (London: Priestly, 1832) 38. For a full listing of the twenty-seven known types of “public” actions or *graphai*, see S.C. Todd, *The Shape of Athenian Law* (Oxford: Clarendon, 1993) 102-05.

Since the *heliaea* determined the meanings of Athens' vaguely defined laws anew in every case, the *dikastai* acted simultaneously as legislatures, judges, and juries. Every case applied its newly defined law retroactively. This practice violated Blackstone's admonition against uniting the power to make law and the power to enforce law in the same entity.<sup>465</sup> It also violated Blackstone's principle that judges should declare the law, not make it.<sup>466</sup>

The universal standing of any citizen to sue public officials for malfeasance, combined with the absence of procedural safeguards for due process, invited the filing of *graphe* actions for purely political ends. Consequently, the *heliaea* were often political rather than judicial bodies in practice.<sup>467</sup> Aristotle observes that the power of the *heliaea* changed the Athenian constitution into a direct democracy with “the people playing the tyrant.”<sup>468</sup>

Universal standing and lack of due process protections also encouraged the filing of frivolous *graphai* proceedings. To protect against frivolous filings, Athens fined prosecutors as much as 1,000 drachmas if they failed to obtain at least one fifth of the *dikast*'s votes. This equaled 1,000 days' wages for a skilled worker. The frivolous prosecutor also suffered a partial loss of privileges (*atimia*), such as standing to bring any *graphai* in the future.<sup>469</sup>

### **E. Solon's Constitution Fails**

Solon took significant precautions to ensure the stable application of his constitution. He forced the Athenians to take an oath to follow his laws for ten years under penalty of a “heavy

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<sup>465</sup> Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 105.

<sup>466</sup> Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838) 46-47.

<sup>467</sup> Robert J. Bonner, *Lawyers and Litigants in Ancient Athens* (New York: Benjamin Blom, 1969) 83.

<sup>468</sup> Aristotle, *Politics*, trans. Benjamin Jowett (Toronto: Dover, 2000) 96.

<sup>469</sup> Douglas MacDowell, *The Law in Classical Athens* (London: Thames and Hudson, 1978) 58; S.C. Todd, *The Shape of Athenian Law* (Oxford: Clarendon, 1993) 114.

curse.” Solon then left Athens for ten years to avoid pressure to change his laws.<sup>470</sup> Even the greatest constitutions, however, cannot enforce themselves, and the social concord Solon sought was short-lived.

Political dissension became so widespread by 589 B.C., only five years after the introduction of Solon's constitution, that Athens was unable to select an *archon*. Some Athenians objected to Solon's nullification of debts, some to Solon's constitution, and others simply preferred to pursue personal rivalries.<sup>471</sup> Regional factions reemerged and their strife mired Athens in “a continual state of internal disorder.”<sup>472</sup>

## **F. Cleisthenes Introduces Ostracism (*Ostrakismos*) (508 B.C.)**

### **1. The Pisistratid Tyrants (546-510 B.C.)**

Beginning in 546 B.C., Pisistratus and his sons Hippias and Hipparchus ruled Athens as tyrants. The Pisistratid tyranny endured until the Alcmeonidae, a powerful noble family, expelled Hippias from Athens in 510 B.C. with the aid of the Spartans.<sup>473</sup> Cleisthenes, a member of the Alcmeonidae and the next constitutional reformer, introduced ostracism (*ostrakismos*) in 508 B.C. to prevent Athens from relapsing into tyranny.

The expulsion of Hippias precipitated a violent power struggle between Cleisthenes and Isagoras, a “friend of the tyrants.” Cleisthenes emerged as the victor after gaining the support of

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<sup>470</sup> Herodotus, *The Histories*, trans. George Rawlinson (Lawrence, KS: Digireads, 2009) 28; Plutarch, “Solon,” *Plutarch's Lives of Illustrious Men*, trans. John Dryden (Boston: Little, Brown, 1880) 65; Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 13-14.

<sup>471</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 18.

<sup>472</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 18. The plains faction followed Lycurgus and desired oligarchy. The coastal faction followed Megacles and desired a moderate government. The hill faction followed Pisistratus and desired a radical democracy.

<sup>473</sup> Herodotus, *The Landmark Herodotus: The Histories*, ed. Robert B. Strassler, trans. Andrea L. Purvis (New York: Anchor, 2007) 393.



the lower classes.<sup>474</sup> Cleisthenes then instituted three reforms in 508 B.C. that mark the beginning of classical Athenian democracy.

## 2. Cleisthenes' Reforms (508 B.C.)

Cleisthenes' first reform sought to diminish the power of the aristocratic families by replacing patronymic names identifying one's father with demotic names identifying one's village (*deme*).<sup>475</sup> Socrates' *deme* was Alopece, a suburb of Athens. Under Cleisthenes' first reform, Socrates son of Sophroniscus became Socrates of Alopece.

Cleisthenes' second reform sought to replace regional factionalism with pan-Athenic solidarity. Cleisthenes replaced the four traditional tribes of Athens with ten "eponymous" tribes named after Greek heroes. Each tribe was composed of ten *demes* from the hill district, ten from the plains district, and ten from the coastal district. Each of the ten tribes sent fifty members each year to comprise a Council of the Five Hundred (*boule*).<sup>476</sup> Cleisthenes' Council of the Five Hundred replaced Solon's Council of the Four Hundred and controlled the agenda of the democratic *ekklesia*.

Cleisthenes' third reform sought to prevent the rise of future tyrants through the procedure of ostracism (*ostrakismos*).<sup>477</sup> Cleisthenes created ostracism in order to prevent the relatives of Pisistratus from reestablishing a tyranny in Athens.<sup>478</sup> Ostracism required the exile of

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<sup>474</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 27-29.

<sup>475</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 29-30.

<sup>476</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 29-30. Solon's Council of the Four Hundred had been composed of 100 members from each of the four tribes. Membership in the Four Hundred was limited, however, to the top three social classes. Consequently, Solon's Four Hundred usually represented the interests of the aristocratic class.

<sup>477</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 30-31.

<sup>478</sup> Cleisthenes created the law in order to prevent another tyranny by exiling the relatives of Pisistratus, tyrant of Athens from 546 to 527 B.C. Cleisthenes' fears of an attempt to restore the tyranny proved well

any political ruler or other individual upon the vote of 6,000 members of the *ekklesia*.<sup>479</sup> Failure to leave the city within ten days was punishable by death.<sup>480</sup>

### 3. *Ostrakismos* Procedure

The *ekklesia* could conduct an *ostrakismos* once a year, during the sixth month of the official calendar. The *ekklesia* utilized the following procedure in conducting an *ostrakismos*. The *boule* presided over the proceeding. A section of the Agora was marked off with wooden rails with an entrance for each of the ten tribes.<sup>481</sup> Each voter scratched the name of the individual he wished to ostracize on a potsherd (*ostrakon*).<sup>482</sup> Entering through his tribe's entrance, each voter deposited his potsherd with the nine *archons*, keeping the *ostrakon* facedown.<sup>483</sup>

So long as 6,000 or more voters deposited an *ostrakon*, the person receiving the most votes was required to leave Athens within ten days. The term of his exile was ten years. Although Athens permitted the ostracized individual to retain his property, failure to comply

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founded. Hippias sought to reestablish his tyranny with the aid of the invading Persians in 490 B.C. The first person ostracized in Athens was one of Pisistratus' relatives, Hipparchus son of Charmus. Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 30-31.

<sup>479</sup> Philochorus Atheniensis, "Fragment 328," *Fragmente der griechischen Historiker*, ed. Felix Jacoby (Brill: Leiden, N.V., 1998); Plutarch, "Aristides," *Plutarch's Lives of Illustrious Men*, trans. John Dryden, vol. 1 (Philadelphia: Coates, 1900) 506; William Smith, ed., *A Dictionary of Greek and Roman Antiquities* (New York: Harper, 1843) 134-36.

<sup>480</sup> Sara Forsdyke, *Exile, Ostracism, and Democracy: The Politics of Expulsion in Ancient Greece* (Princeton: Princeton UP, 2005) 149.

<sup>481</sup> Philochorus Atheniensis, "Fragment 328," *Fragmente der griechischen Historiker*, ed. Felix Jacoby (Brill: Leiden, N.V., 1998); Plutarch, "Aristides," *Plutarch's Lives of Illustrious Men*, trans. John Dryden, vol. 1 (Philadelphia: Coates, 1900) 506; William Smith, ed., *A Dictionary of Greek and Roman Antiquities* (New York: Harper, 1843) 134-36.

<sup>482</sup> Plutarch, "Aristides," *Plutarch's Lives of Illustrious Men*, trans. John Dryden, vol. 3 (Philadelphia: Coates, 1900) 506.

<sup>483</sup> Philochorus Atheniensis, "Fragment 328," *Fragmente der griechischen Historiker*, ed. Felix Jacoby (Brill: Leiden, N.V., 1998); Plutarch, "Aristides," *Plutarch's Lives of Illustrious Men*, trans. John Dryden, vol. 1 (Philadelphia: Coates, 1900) 506; William Smith, ed., *A Dictionary of Greek and Roman Antiquities* (New York: Harper, 1843) 134-36.

with the terms of exile carried the death penalty.<sup>484</sup>

*Ostrakismos* procedure provided no due process protections. No impartial tribunal presided over the proceeding. Litigants received no counsel. The targeted subject received no notice of any charges, no evidence of wrongdoing was required, and the law provided no defense. Targeted individuals received no trial and no opportunity to address the voters. The first vote was final, and no appeal was possible. In sum, *ostrakismos* intentionally permitted the exile and sometimes even the execution of the innocent.

#### **4. Misuse of Ostracism (*Ostrakismos*) (505 B.C.)**

Although Cleisthenes introduced *ostrakismos* as a shield against tyranny, its lack of due process protections rendered it susceptible to misuse. Athens employed ostracism as a shield against tyranny for only three years.<sup>485</sup> Athens then transformed *ostrakismos* into a sword for the envious and the politically ambitious.

Plutarch observes that *ostrakismos* merely gave “the name of fear of tyranny” to Athenian jealousy in order to obtain “relief and mitigation of envious feeling.”<sup>486</sup> “The spirit of the people,” Plutarch continues, “naturally entertained feelings of dislike toward all of more than common fame and reputation.”<sup>487</sup> “[O]stracism was not a penalty,” Plutarch continues, “but a way of pacifying and alleviating that jealousy which delights to humble the eminent, breathing

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<sup>484</sup> Sara Forsdyke, *Exile, Ostracism, and Democracy: The Politics of Expulsion in Ancient Greece* (Princeton: Princeton UP, 2005) 149.

<sup>485</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 30-31: “Thus for three years they continued to ostracize the friends of the tyrants, on whose account the law had been passed; but in the following year they began to remove others as well, including eighty-one who seemed to be more powerful than was expedient.”

<sup>486</sup> Plutarch, “Aristides,” *Plutarch’s Lives of Illustrious Men*, trans. John Dryden (Boston: Little, Brown, 1880) 230, 233.

<sup>487</sup> Plutarch, “Aristides,” *Plutarch’s Lives of Illustrious Men*, trans. John Dryden, vol. 1 (Philadelphia: Coates, 1900) 506.

out its malice into this disfranchisement.”<sup>488</sup> Ostracism “was not usually inflicted on the poorer citizens, but on those of great houses, whose station exposed them to envy.” “Every one was liable to it whom his reputation, birth, or eloquence raised above the common level.”<sup>489</sup> Diodorus records that “this law was used at Athens, not so much as a punishment for any particular offence, as to humble the spirit of proud and aspiring men, and by their banishment to reduce them to more moderation and submission.”<sup>490</sup>

Originally intended to protect Athens against vaulting political ambition, *ostrakismos* became the most powerful tool for realizing such ambitions. Politicians took advantage of the absence of due process protections to harness the envy and gullibility of common men. The *archon* Aristides, a follower of Cleisthenes and a hero of the battle of Marathon in 490 B.C., was an early victim of a politically motivated *ostrakismos*. Themistocles became *archon* in 483 B.C. by ostracizing Aristides.<sup>491</sup> Themistocles secured Aristides' *ostrakismos* by spreading the false rumor that Aristides intended to establish himself as king.<sup>492</sup>

Although Themistocles saved Athens from the second Persian invasion in 480 B.C., his wealthy rival Cimon became general in 471 B.C. after ostracizing Themistocles.<sup>493</sup> Athens ostracized Themistocles from envy for the honors he received for saving Athens from the

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<sup>488</sup> Plutarch, “Themistocles,” *Plutarch's Lives*, trans. Bernadotte Perrin (Cambridge: Harvard UP, 1914) 2.

<sup>489</sup> Plutarch, “Aristides,” *Plutarch's Lives of Illustrious Men*, trans. John Dryden (Boston: Little, Brown, 1880) 230, 233.

<sup>490</sup> Diodorus Siculus, *The Historical Library of Diodorus*, trans. G. Booth, vol. 1 (London: McDowell, 1814) 404 (discussing the ostracism of Themistocles).

<sup>491</sup> Plutarch, “Themistocles,” *Plutarch's Lives of Illustrious Men*, trans. John Dryden, vol. 1 (Philadelphia: Coates, 1900) 181.

<sup>492</sup> Plutarch, “Aristides,” *Plutarch's Lives of Illustrious Men*, trans. John Dryden, vol. 1 (Philadelphia: Coates, 1900) 506.

<sup>493</sup> Plutarch, “Themistocles,” *Plutarch's Lives of Illustrious Men*, trans. John Dryden, vol. 1 (Philadelphia: Coates, 1900) 190; Diodorus Siculus, *The Historical Library of Diodorus*, trans. G. Booth, vol. 1 (London: McDowell, 1814) 404.

Persians at the Battle of Salamis.<sup>494</sup> Cimon's rival Pericles became general in 461 B.C.<sup>495</sup> after ostracizing Cimon "on a trifling pretext."<sup>496</sup> Pericles was himself removed from office and fined in an *eisangelia* impeachment before the *ekklesia* in 443 B.C.<sup>497</sup>

Since *ostrakismos* required no evidence of wrongdoing and provided no due process protections, the *ekklesia* often made imprudent decisions that it later regretted. The *ekklesia* recalled Aristides, Cimon, and Alcibiades and restored them to leadership before their ten years of exile were completed.<sup>498</sup> *Ostrakismos* did more than deprive Athens of her most talented leaders. *Ostrakismos* actually transformed its victims into some of Athens' most dangerous enemies.<sup>499</sup>

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<sup>494</sup> Plutarch, "Themistocles," *Plutarch's Lives of Illustrious Men*, trans. John Dryden, vol. 3 (Philadelphia: Coates, 1900) 190.

<sup>495</sup> Plutarch, "Pericles," *Plutarch's Lives of Illustrious Men*, trans. John Dryden, vol. 3 (Philadelphia: Coates, 1900) 240, 242-243.

<sup>496</sup> Plutarch, "Aristides," *Plutarch's Lives of Illustrious Men*, trans. John Dryden, vol. 1 (Philadelphia: Coates, 1900) 506.

<sup>497</sup> Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 200-203; Plutarch, "Pericles," *Plutarch's Lives of Illustrious Men*, trans. John Dryden, vol. 3 (Philadelphia: Coates, 1900) 268.

<sup>498</sup> Aristides was recalled from his ostracism when the Persians invaded in 480 B.C. because the "people regretted his absence and were fearful that he might go over to the Persians to revenge himself, and thereby ruin the affairs of Greece." Plutarch, "Themistocles," *Plutarch's Lives of Illustrious Men*, trans. John Dryden, vol. 3 (Philadelphia: Coates, 1900) 181. Athens recalled Cimon to negotiate a peace treaty with the Spartans, who were adverse to Pericles. Plutarch, "Pericles," *Plutarch's Lives of Illustrious Men*, trans. John Dryden, vol. 3 (Philadelphia: Coates, 1900) 243. The oligarchy of the 400 recalled Alcibiades in 411 B.C. and gave him command of the Athenian fleet. Donald Kagan, *The Peloponnesian War* (New York: Viking, 2003) 389.

<sup>499</sup> Hippias, the deposed tyrant of Athens, led Xerxes' Persians against the Athenians at the battle of Marathon in 490 B.C. Thucydides, *History of the Peloponnesian War*, trans. Rex Warner (New York: Penguin, 1972) 446. After Athens sentenced Themistocles to death in absentia and seized his property in a political prosecution in 466 B.C., he received refuge from Artaxerxes by promising to lead a third Persian invasion against Athens. Plutarch, "Themistocles," *Plutarch's Lives of Illustrious Men*, trans. John Dryden, vol. 3 (Philadelphia: Coates, 1900) 186, 191. Alcibiades became a lethal enemy of Athens after his fraudulent political prosecution in 415 B.C. Alcibiades defected to Sparta and his strategy caused Athens to lose the Sicilian campaign and permanently lose the initiative in the Peloponnesian War. Thucydides, *History of the Peloponnesian War*, trans. Rex Warner (New York: Penguin, 1972) 465-470, 478-83, and 488-96; Plutarch, "Alcibiades," *Plutarch's Lives of Illustrious Men*, trans. John Dryden, vol. 3 (Philadelphia: Coates, 1900) 318.

## G. Impeachment Proceedings (*Eisangelia*)

### 1. Procedure

The third politically significant proceeding was the impeachment (*eisangelia*). *Eisangeliai* permitted the prosecution and execution of any public office holder or any citizen making a public proposal.<sup>500</sup> The *eisangelia* procedure, which literally means a “public announcement” or “laying of information,” offered significant advantages for politically ambitious litigators. Unlike *graphai* proceedings, there was no penalty if the prosecutor failed to obtain at least one fifth of the *dikasts*' votes or dismissed the case in exchange for payment.<sup>501</sup> Unlike the *euthanai* proceeding for official malfeasance, which a prosecutor could file only at the end of a public official's term, a prosecutor could file an *eisangeliai* action at any time.<sup>502</sup> These advantages made the *eisangelia* the preferred vehicle for political prosecutions.

Any citizen could act as prosecutor and initiate an *eisangelia* in one of two ways. First, the prosecutor could lay the *eisangelia* before the Council of the 500 (*boule*).<sup>503</sup> The *boule*, whose primary function was to determine the agendas for meetings of the *ekklesia*,<sup>504</sup> would pass a preliminary verdict. It would then refer any meritorious case to the *heliaea* for trial.

The second and more common procedure for initiating an *eisangelia* was to bring the action directly before the *ekklesia*.<sup>505</sup> In such cases, the *boule* would draft an indictment but it would not reach a preliminary verdict. The *ekklesia* would then decide whether to hear the case

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<sup>500</sup> Elizabeth Markovits, *The Politics of Sincerity: Plato, Frank Speech, and Democratic Judgment* (University Park, PA: Penn State Press, 2008) 58.

<sup>501</sup> S.C. Todd, *The Shape of Athenian Law* (Oxford: Clarendon, 1993) 114. Until 330 B.C., a prosecutor suffered no penalty if he dropped an *eisangelia* prosecution before trial or if he only obtained a few of the jury's votes. Douglas MacDowell, *The Law in Classical Athens* (London: Thames and Hudson, 1978) 58.

<sup>502</sup> S.C. Todd, *The Shape of Athenian Law* (Oxford: Clarendon, 1993) 112-14.

<sup>503</sup> S.C. Todd, *The Shape of Athenian Law* (Oxford: Clarendon, 1993) 114.

<sup>504</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 29-30. The *boule* consisted of fifty men selected by lot from each of the ten tribes established by Cleisthenes.

<sup>505</sup> S.C. Todd, *The Shape of Athenian Law* (Oxford: Clarendon, 1993) 114-15.

itself or refer it to the *heliaea* for trial.<sup>506</sup>

Like the *graphai* proceeding, the *eisangelia* lacked basic due process protections. If tried before the *ekklesia*, the proceeding usually involved undefined laws. There were no trained judges, no meaningful rules of evidence, and the litigants had no right to counsel. Every case was determined on an *ad hoc* basis without regard to precedent.

In addition to the above, if the *boule* or *ekklesia* referred the case to the *heliaea* for trial, the *heliaea* decided the case in the heat of a single sitting. There was little or no time for deliberation because the *dikasts* had to deliver their verdicts before sunset. There was no appeal from the initial decision. Since the *heliaea* supplied new meanings and penalties for Athens' undefined laws in every case, the *dikastai* acted simultaneously as legislatures, judges, and juries. The *heliaea* thus acted retroactively in every case.

## **2. Impeachment Proceedings (*Eisangelia*) Used Against the *Areopagites* (462 B.C.)**

The next great reformer after Solon and Cleisthenes was the Athenian general Ephialtes. Utilizing a series of *eisangelia* prosecutions, Ephialtes orchestrated the demise of the oligarchic Council of the Areopagus in 462 B.C.<sup>507</sup> Solon had drastically reduced the powers of the Council of the Areopagus under the constitution of 594 B.C.,<sup>508</sup> but the Council resumed control of the state after leading the repulsion of the Persian invasion in 480 B.C. at the Battle of Salamis.<sup>509</sup>

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<sup>506</sup> S.C. Todd, *The Shape of Athenian Law* (Oxford: Clarendon, 1993) 114-15.

<sup>507</sup> R. Sealey, "Ephialtes, Eisangelia, and the Council," *Classical Contributions: Studies in Honour of M.F. McGregor*, ed. G.S. Shrimpton and D.J. McCargar (Locust Valley, NY: Augustin, 1981) 125-34.

<sup>508</sup> Solon's constitution deprived the Council of the Areopagus of the power to select the nine archons. Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 11.

<sup>509</sup> The Council of the Areopagus returned to political prominence after the Battle of Salamis in 480 B.C. Athens panicked when Xerxes marched on Athens in 480 B.C. See Herodotus, *The Landmark Herodotus: The Histories*, ed. Robert B. Strassler, trans. Andrea L. Purvis (New York: Anchor, 2007) 621-23. The Athenian generals were "utterly at a loss" as to how to meet the crisis and issued a proclamation that everyone should seek their own safety. Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 32-33. The Council of the Areopagus stepped into the breach and provided the strategy, financing, and organization for the great Athenian victory at Salamis. Plutarch, "Themistocles," *Plutarch's Lives of Illustrious Men*, trans. John Dryden, vol. 3 (Philadelphia: Coates,

Among other powers, the Council of the Areopagus could nullify laws and disqualify candidates from seeking office. It thus constituted an oligarchic stronghold in Athens' government.

Ephialtes' reforms succeeded in transferring most of the Areopagites' powers to the *heliaea*. Ephialtes' first strategy in attacking the Council of the Areopagus was to ruin individual members of the Council through *eisangelia* prosecutions. Aristotle describes these prosecutions as a series of "actions against them with reference to their administration."<sup>510</sup>

Ephialtes' second strategy was to form an alliance against the Council of the Areopagus with the Athenian general Themistocles. Themistocles, architect of the Greek victory at Salamis,<sup>511</sup> was a member of the Council. Themistocles had recently learned, however, that his enemies on the Council were planning to bring false charges against him for treason with Persia.<sup>512</sup>

Together, by denouncing the Council of the Areopagus to both the *boule* and the *ekklesia*, Ephialtes and Themistocles succeeded in depriving the Council of its power.<sup>513</sup> By 462 B.C., the Council of the Areopagus was "deprived of its superintendence of affairs," and its authority reduced to conducting trials for murder, wounding, and death by poison. It could conduct preliminary investigations of political corruption, but was required to forward its findings to the *boule* and the *ekklesia* for further action.

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1900) 180. Because of its successful handling of the Persian crisis, the Council of the Areopagus "once more developed strength and assumed the control of the state." Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 32. The Council of the Areopagus maintained political supremacy in Athens for seventeen years until the reforms of Ephialtes in 462 B.C.

<sup>510</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 34.

<sup>511</sup> Herodotus, *The Landmark Herodotus: The Histories*, ed. Robert B. Strassler, trans. Andrea L. Purvis (New York: Anchor, 2007) 523, 554, 624, 632, 819; Plutarch, "Themistocles," *Plutarch's Lives of Illustrious Men*, trans. John Dryden, vol. 3 (Philadelphia: Coates, 1900) 180-83.

<sup>512</sup> Plutarch, "Themistocles," *Plutarch's Lives of Illustrious Men*, trans. John Dryden, vol. 3 (Philadelphia: Coates, 1900) 190.

<sup>513</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 35.



To bar the oligarchic Council of the Areopagus from ever returning to power, Ephialtes adopted a third strategy of permanently diminishing the prestige of membership on the Council. Ephialtes accomplished this goal in two steps. First, he reinstated Solon's earlier reform that Athens select her nine *archons* by lot rather than by election.<sup>514</sup> The *archons* comprised the future membership of the Council. Second, Ephialtes broadened the eligibility for archonship to include the third of Solon's four social classes, the *zeugitae* or "yoked men."<sup>515</sup>

Many writers are effusive in their praise of Ephialtes' character.<sup>516</sup> Unable to defeat Ephialtes politically, and finding him a relentless and incorruptible champion of the people's rights, the oligarchs murdered him in 461 B.C.<sup>517</sup> In life, Ephialtes' reforms transferred most of the Areopagites' powers to the *heliaea*. His death brought his protégé Pericles to political prominence. Pericles' introduction of payment to the *dikasts* for service in the *heliaea* marked the final step in the rise of the *heliaea* to political dominance.

#### **H. Pericles Introduces Payment of the *Dikasts* (451 B.C.)**

The great political rivalry in Athens after the assassination of Ephialtes was between Cimon, a wealthy member of the Council of the Areopagus, and Ephialtes' protégé Pericles. Cimon used his great wealth to curry popular favor and political advantage, even refusing to

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<sup>514</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 35-36.

<sup>515</sup> The *Zeugitae* or yoked men (from the Greek word for "yoke"), consisted of those producing 200 measures of fruit per year. Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 100. Accord, Aristotle, *Politics*, trans. Benjamin Jowett (Toronto: Dover, 2000) 96; Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 9-10.

<sup>516</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 35; Plutarch, "Pericles," *Plutarch's Lives of Illustrious Men*, trans. John Dryden, vol. 3 (Philadelphia: Coates, 1900) 244; C. Hignett, *A History of the Athenian Constitution to the End of the Fifth Century B.C.* (Oxford: Clarendon, 1975) 195.

<sup>517</sup> Aritodicus of Tanagra committed the murder. Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 35; Plutarch, "Pericles," *Plutarch's Lives of Illustrious Men*, trans. John Dryden, vol. 3 (Philadelphia: Coates, 1900) 244.

fence his estate so that anyone who wished could help himself to its fruit.<sup>518</sup> Realizing that he was “beaten in the matter of private possessions,” Pericles accepted the advice of Damonides and countered Cimon’s wealth by making “gifts to the people from their own property.”<sup>519</sup> Accordingly, as a “bid for popular favor to counterbalance the wealth of Cimon,” Pericles instituted pay for *dikasts* in 451 B.C.<sup>520</sup>

The Athenian legal system utilized large numbers of *dikasts* selected by lot from a volunteer pool. Many of the potential *dikasts*, however, could not afford to lose their income to serve in the *heliaea*. The amount of pay introduced by Pericles was three obols per day, equal to one day’s living wage.<sup>521</sup> By comparison, the payment for a day’s work by an artisan, including architects, was six obols.<sup>522</sup> Pericles’ innovation allowed every citizen to serve and exercise the formidable powers granted the *heliaea* by previous reforms.

The impact of Pericles’ innovation on Athenian history must not be underestimated. The *heliaea* were the dominant political force in the Athenian empire.<sup>523</sup> Solon, Cleisthenes, and Ephialtes had elevated the power of the *heliaea* above all other institutions in the Athenian constitution. The expansion of the Athenian empire in the fifth century B.C. added to the business conducted by the *heliaea*. “The courts [*heliaea*] were in almost perpetual session; their jurisdiction extended to every aspect and department of public life; and from their decision there

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<sup>518</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 37.

<sup>519</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 37.

<sup>520</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 37.

<sup>521</sup> The date of this policy is uncertain but estimated at 451 B.C. The rate of pay may have originally been 2 obols, raised to 3 in 425 B.C. Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 101-02.

<sup>522</sup> Six obols equaled one drachma. Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 24-25.

<sup>523</sup> Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 112.

was no appeal.”<sup>524</sup>

Pericles' reform of the Athenian constitution made Athens the most complete democracy “the world has ever known. Yet it was that constitution which in the long run proved the undoing of Athens.”<sup>525</sup> The sovereignty of the people found expression in the *heliaea* even more effectively than in the *boule* or the *ekklesia*. “Yet it was the citizen of the poorest class who was attracted by the pay, and it was he who sat enthroned in the courts.”<sup>526</sup>

### I. Political Prosecutions in Athens

Pericles' payment of *dikasts* placed the reins of unrestrained power in the grasp of those least able to wield them, and they soon drove Athens to her destruction. The absence of basic procedural safeguards enabled litigants to utilize the full powers of the *ekklesia* and the *heliaea* in order to realize their personal political ambitions, satisfy their envy, and discharge their personal grudges. Political prosecutions were effective in part because of the gullibility of the Athenian *dikast*.<sup>527</sup>

Democrats and oligarchs alike employed *graphai*, *eisangeliai*, and *ostrakismos* proceedings for these purposes. The democratic reformer Ephialtes used *eisangeliai* prosecutions to weaken the oligarchic Council of the Areopagus in 462 B.C.<sup>528</sup> In 411 B.C., oligarchic conspirators led by the orator Antiphon used systematic *eisangeliai* prosecutions of democratic officials for embezzlement to discredit democracy in the wake of the disastrous campaign in

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<sup>524</sup> Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 112.

<sup>525</sup> Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 74.

<sup>526</sup> Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 112.

<sup>527</sup> Thucydides writes that the Athenians were always in fear and took everything suspiciously. Thucydides, *History of the Peloponnesian War*, trans. Rex Warner (New York: Penguin, 1972) 442-43.

<sup>528</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 34; Robert J. Bonner, *Lawyers and Litigants in Ancient Athens* (New York: Benjamin Blom, 1969) 100.

Sicily. These prosecutions helped establish the brutal Oligarchy of the 400.<sup>529</sup> In 404 B.C., the even more brutal Thirty Tyrants silenced popular opposition by securing the legal condemnation and death of their most effective leaders.<sup>530</sup> “So convenient was this method of dealing with opponents that the hundreds of virtual assassinations which made the brief tyranny of the Thirty notorious were cloaked by a simulation of legal procedure.”<sup>531</sup>

Athens is justly infamous for political prosecutions of those men who most deserved her honors. Themistocles saved Athens from the Persians in 480 B.C. Nevertheless, Athens condemned the exiled Themistocles in an *eisangelia* prosecution *in absentia* and sentenced him to death in 470 B.C.<sup>532</sup> Pericles was Athens' noblest public servant. Nevertheless, Athens prosecuted, fined, and removed Pericles from office in an *eisangelia* prosecution in 443 B.C.<sup>533</sup>

These injustices brought disastrous consequences. Alcibiades was Athens' ablest commander. Nevertheless, Athens condemned Alcibiades to death in an *eisangelia* prosecution on fraudulent evidence in 415 B.C.<sup>534</sup> Eight of Athens' generals won a great naval victory against

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<sup>529</sup> Robert J. Bonner, *Lawyers and Litigants in Ancient Athens* (New York: Benjamin Blom, 1969) 100.

<sup>530</sup> Robert J. Bonner, *Lawyers and Litigants in Ancient Athens* (New York: Benjamin Blom, 1969) 100; George Miller Calhoun, *Athenian Clubs in Politics and Litigation* (Austin: U. Texas Bull., 1913) 105: “The possibilities of the political suit are particularly to be seen in the revolution of 404. Opposition to the carrying out of the revolutionary program was effectually crushed by a series of prosecutions brought against the democratic leaders. First Cleophon, the reigning demagogue, was cited before a court made up of oligarchic sympathizers and was condemned and executed, ostensibly for desertion of post, ‘but in reality because he spoke against tearing down the walls.’ Shortly thereafter, Strombichides, Dionysodorus, Eucrates, and others of the more influential politicians who had combined to resist the oligarchic movement were arrested on trumped-up charges and in course of time were put to death, in order that they might not speak in the assembly against the program which the oligarchic conspirators had arranged.”

<sup>531</sup> George Miller Calhoun, *Athenian Clubs in Politics and Litigation* (Austin: U. Texas Bull., 1913) 105.

<sup>532</sup> Plutarch, “Themistocles,” *Plutarch’s Lives of Illustrious Men*, trans. John Dryden (Boston: Little, Brown, 1880) 185-97; Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 63-64.

<sup>533</sup> Plutarch, “Pericles,” *Plutarch’s Lives of Illustrious Men*, trans. John Dryden, vol. 3 (Philadelphia: Coates, 1900) 269.

<sup>534</sup> Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 286; Plutarch, “Alcibiades,” *Plutarch’s Lives of Illustrious Men*, trans. John Dryden, vol. 3 (Philadelphia: Coates, 1900) 317.

the Spartans at Arginusae in 406 B.C.<sup>535</sup> The generals were nevertheless condemned to death in an *eisangelia* prosecution when a sea storm prevented the rescue of survivors.<sup>536</sup>

The *eisangelia* prosecution of Alcibiades in 415 B.C. led to disaster in the Sicilian campaign and cost Athens the initiative in the Peloponnesian War. The *eisangelia* prosecution of the Arginusae generals in 404 B.C. led to a disastrous naval defeat at Aegospotami the following year and the loss of the war. The *graphe* prosecution of Socrates for impiety in 399 B.C. gave democratic Athens the indelible reputation of “decreeing to the same citizens the hemlock on one day and statues on the next.”<sup>537</sup> As demonstrated below, each of these prosecutions illuminates the failure of the Athenian legal system to satisfy the principles of reason, autonomy, and consent.

### 1. The Trial of Alcibiades (415 B.C.)

The absence of due process safeguards subjected the Athenian legal system to exploitation through fraudulent evidence. This susceptibility is illustrated by the *eisangelia* prosecution of the Athenian general Alcibiades before the *ekklesia* in 415 B.C. Motivated by a spirit of adventure, aggrandizement, and greed, the *ekklesia* voted to send an expedition to Sicily in 415 B.C.<sup>538</sup> Two of Athens’ generals, Alcibiades and Nicias, adopted rival positions in the debates leading up to the decision. Alcibiades favored the expedition and Nicias opposed it.<sup>539</sup>

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<sup>535</sup> The eight generals were Aristocrates, Diomedon, Pericles (son of the political leader), Erasinides, Protomachus, Thrasyllus, Lysias, and Aristogenes. Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 356.

<sup>536</sup> Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 354-58.

<sup>537</sup> Alexander Hamilton, John Jay, and James Madison, “Federalist No. 63,” *The Federalist Papers*, ed. Ernest O’Dell (Sundown, TX: CreateSpace, 2010) 289.

<sup>538</sup> Thucydides gives the classic description of this expedition and its destruction in Books VI and VII of his *History of the Peloponnesian War*. Thucydides, *History of the Peloponnesian War*, trans. Rex Warner (New York: Penguin, 1972) 409-525.

<sup>539</sup> Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 284-85.

In an effort to persuade the *ekklesia* to abandon the expedition, Nicias intentionally exaggerated the resources that the expedition would require for success. Rather than cancel the expedition, however, the *ekklesia* appropriated the massive resources enumerated by Nicias, including one hundred triremes and 5,000 hoplites.<sup>540</sup> Almost all of these men and resources would be lost as the result of a fraudulent *eisangelia* prosecution brought by Alcibiades' enemies.

As the moving force behind the expedition, Alcibiades stood to gain the most politically from its success. "There was hardly a politician in Athens who did not dread for himself or the city the predominance that awaited Alcibiades should he return victorious from Sicily."<sup>541</sup> This was particularly true for two of Alcibiades' political opponents, the demagogue leaders Peisander and Androcles. Even before the expedition left Athens, Peisander and Androcles searched for any opportunity to damage Alcibiades.

The opportunity they sought soon presented itself. Shortly before Alcibiades' expedition sailed, vandals defaced nearly all the stone *hermae* in the city in one night.<sup>542</sup> The city interpreted this sacrilege as an evil omen for the Sicilian expedition preparing to sail. Athens offered large rewards and promised immunity to anyone who came forth with information to identify the responsible parties. Alcibiades' enemies managed to broaden the scope of the investigation to include *any* act of impiety,<sup>543</sup> and paid informers soon accused Alcibiades of mocking the

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<sup>540</sup> Thucydides, *History of the Peloponnesian War*, trans. Rex Warner (New York: Penguin, 1972) 424-25; Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 284-86.

<sup>541</sup> Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 289.

<sup>542</sup> Thucydides, *History of the Peloponnesian War*, trans. Rex Warner (New York: Penguin, 1972) 426. The *hermae* were busts of Hermes carved on square pillars of stone that stood in large numbers at shrines, in the temples, and in the entrances to private houses. Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 286.

<sup>543</sup> Thucydides, *History of the Peloponnesian War*, trans. Rex Warner (New York: Penguin, 1972) 426.

mysteries of Eleusis at a private party.<sup>544</sup>

Alcibiades' enemies charged that the impieties of Alcibiades and other prominent Athenians revealed the existence of a conspiracy among the Athenian elite to overthrow the democracy.<sup>545</sup> Alcibiades demanded an immediate trial, but his enemies succeeded in delaying it. They sought the delay for two reasons. First, they believed that a conviction would be easier to obtain once Alcibiades' supporters in the military had left Athens. Second, the ability to recall Alcibiades at a time of their choosing made them, not Alcibiades, masters of his military career.<sup>546</sup>

Cimon's son Thessalus filed formal charges against Alcibiades that Alcibiades "committed a crime against the goddess Ceres and Proserpine, by representing in derision the holy mysteries, and showing them to his companions in his own house."<sup>547</sup> Plutarch records the fraudulent evidence supporting the charges against Alcibiades. One informer testified that he recognized Alcibiades by the light of the moon, even though the events occurred under a new

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<sup>544</sup> The Eleusinian mysteries recreated the myth of Persephone, the daughter of Zeus and Demeter, in three phases. The first was the "descent" or abduction of Persephone. The second was the "search" of Demeter for her daughter. The third was the ascent of Persephone to the earth. There were two Eleusinian mysteries. The Greater, held every five years, signified the happiness of the soul after death when the soul is purified of the material defilement of the human body. The Lesser, held every year, signified the miseries of the soul when subjected to the material defilement of the human body. Thomas Taylor, *The Eleusinian and Bacchic Mysteries* (New York: Bouton, 1891) 33-46.

<sup>545</sup> Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 286.

<sup>546</sup> Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 286.

<sup>547</sup> Plutarch reports the indictment as follows: "Thessalus, the son of Cimon, of the township of Lacia, lays information that Alcibiades, the son of Clinias of the township of the Scambouidce, has committed a crime against the goddess Ceres and Proserpine, by representing in derision the holy mysteries, and showing them to his companions in his own house. Where, being habited in such robes as are used by the chief priest when he shows the holy things, he named himself the chief priest, Polytion the torch-bearer, and Theodorus, of the township of Phegaea, the herald; and saluted the rest of his company as Initiates and Novices, all which was done contrary to the laws and institutions of the Eumopidae, and the heralds and priests of the temple at Eleusis." Plutarch, "Alcibiades," *Plutarch's Lives of Illustrious Men*, trans. John Dryden, vol. 3 (Philadelphia: Coates, 1900) 317.

moon.<sup>548</sup>

Nevertheless, Athens recalled Alcibiades and dispatched a galley to return him to Athens for trial. Fearing a mutiny of the forces under Alcibiades' command, however, the authorities ordered the galley not to seize Alcibiades. Instead, they instructed Alcibiades to follow the galley back to Athens in his own ship. Alcibiades pretended to acquiesce to the recall but escaped at the Greek colony of Thurii on the Italian mainland.<sup>549</sup>

Athens convicted Alcibiades as contumacious for failing to appear. The *ekklesia* condemned him to death, ordered his property seized, and required the priests and priestesses of Athens to curse him.<sup>550</sup> When Alcibiades learned that the *ekklesia* had ordered his death, he replied, "I will make them feel that I am alive."<sup>551</sup>

Condemned to death, and judging that the radical democracy of Athens would never restore him, Alcibiades sought refuge with Sparta.<sup>552</sup> Guided by Alcibiades, the Spartans intervened against the Athenians in Sicily.<sup>553</sup> The Spartans also fortified Decelea, a village approximately fourteen miles north of Athens and visible from Athens.<sup>554</sup> This fortification gave the Spartans control of the plain of rural Attica and worked "great damage" upon Athens. By

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<sup>548</sup> Plutarch, "Alcibiades," *Plutarch's Lives of Illustrious Men*, trans. John Dryden, vol. 3 (Philadelphia: Coates, 1900) 314.

<sup>549</sup> Plutarch, "Alcibiades," *Plutarch's Lives of Illustrious Men*, trans. John Dryden, vol. 3 (Philadelphia: Coates, 1900) 317.

<sup>550</sup> Plutarch, "Alcibiades," *Plutarch's Lives of Illustrious Men*, trans. John Dryden, vol. 3 (Philadelphia: Coates, 1900) 318.

<sup>551</sup> Plutarch, "Alcibiades," *Plutarch's Lives of Illustrious Men*, trans. John Dryden, vol. 3 (Philadelphia: Coates, 1900) 317.

<sup>552</sup> Plutarch, "Alcibiades," *Plutarch's Lives of Illustrious Men*, trans. John Dryden, vol. 3 (Philadelphia: Coates, 1900) 318.

<sup>553</sup> Thucydides, *History of the Peloponnesian War*, trans. Rex Warner (New York: Penguin, 1972) 470, 478-83.

<sup>554</sup> Thucydides, *History of the Peloponnesian War*, trans. Rex Warner (New York: Penguin, 1972) 465-70, 488-96; Plutarch, "Alcibiades," *Plutarch's Lives of Illustrious Men*, trans. John Dryden, vol. 3 (Philadelphia: Coates, 1900) 318.



maintaining a year round presence at Decelea, the Spartans cut off food supplies to Athens and denied access to the Larium silver mines, one of Athens' chief sources of revenue.

Alcibiades' defection also left command of the Sicilian expedition in the hands of the less able Nicias. The result of all these factors was the destruction of the Athenian expedition. Athens lost more than 207 triremes and more than 40,000 hoplites and rowers.<sup>555</sup> Thucydides records the Sicilian expedition as "the most calamitous defeat; for they were utterly and entirely defeated; their sufferings were on an enormous scale: the losses were, as they say, total; army, navy, everything was destroyed, and, out of many, only few returned. So ended the events in Sicily."<sup>556</sup>

Athens had exhausted its financial resources as well. Athens' allies began to desert her and her traditional enemy Persia intervened on the Spartan side.<sup>557</sup> These reversals led to the fall of the democratic government and a return to oligarchy in 411 B.C.

## **2. The Trial of the Arginusae Generals (406 B.C.)**

The absence of due process safeguards subjected the Athenian legal system to emotional manipulation as well as fraudulent evidence. The *eisangelia* condemnation of the Arginusae generals by the *ekklesia* after their naval victory at Arginusae in 406 B.C. illustrates this susceptibility. Socrates attempted but failed to prevent the generals' condemnation.<sup>558</sup>

In July 406 B.C., the Spartans trapped the Athenian fleet in the harbor of Mitylene on

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<sup>555</sup> Thucydides, *History of the Peloponnesian War*, trans. Rex Warner (New York: Penguin, 1972) 520-37.

<sup>556</sup> Thucydides, *History of the Peloponnesian War*, trans. Rex Warner (New York: Penguin, 1972) 537.

<sup>557</sup> Thucydides, *History of the Peloponnesian War*, trans. Rex Warner (New York: Penguin, 1972) 541-62.

<sup>558</sup> By luck of the lottery, Socrates was serving on the *prytaneis*, the presiding committee of the Council when the trial took place before the entire *ekklesia*. Xenophon, *A History of My Times (Hellenica)*, trans. Rex Warner (London: Penguin, 1979) 88-89; Plato, "Apology," *The Trial and Death of Socrates: Four Dialogues*, trans. Benjamin Jowett (New York: Dover, 1992) 33.

the island of Lesbos.<sup>559</sup> The Athenian commander Conon sent Athens a desperate plea for help. Although the Sicilian disaster had largely depleted Athens' resources, Athens made a heroic effort to rescue its imperiled fleet.<sup>560</sup> The Athenians converted the silver plate in their temples into currency, and they minted their gold statues of Nike into coins. Athens pressed citizens, subjects, metics, and slaves into service as oarsmen without regard to social status. The Athenians managed to place 110 ships into service within thirty days, and this fleet rendezvoused with forty additional ships at Samos.

The Athenians engaged the Spartan fleet at the Arginusae Islands, between the mainland and the trapped Athenian fleet at Mitylene. The Athenian fleet divided its command between eight generals, each of whom commanded a squadron of fifteen ships. The battle at Arginusae was the most desperate of the entire Peloponnesian War. If Athens lost the battle, she was defeated, for she “had ventured her last stake.”<sup>561</sup>

Athens achieved an unexpected and heroic victory. The Spartan fleet lost sixty-nine ships. Athens suffered only thirteen ships sunk and twelve ships seriously damaged. A jubilant Athens emancipated the slaves who fought in the battle and granted them citizenship.

The generals, however, received different treatment. After the battle, the Athenian generals sailed to rescue the Athenian fleet trapped at Mitylene, where the Spartans had a reserve force of fifty ships. The generals delegated two captains, Theramenes and Thrasybulus, to rescue

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<sup>559</sup> See generally Xenophon, *A History of My Times (Hellenica)*, trans. Rex Warner (London: Penguin, 1979) 78-85; and Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 354-58.

<sup>560</sup> Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 355: “Athens was at length face-to-face with the danger at which it had shuddered [after the Sicilian campaign] in 413 B.C.; and now it had no reserve of money to fall back upon. Yet the people never faltered. Mad the multitude may have been and ungovernable, but it was superb in the resolution with which it faced a world in arms.”

<sup>561</sup> Evelyn Abbot, *A History of Greece, Part III: From the Thirty Years Peace to the Fall of the Thirty at Athens, 445-403 B.C.* (New York: Putnam's, 1900) 443-44.

survivors from the stricken ships, but a storm prevented their rescue, doubling the number of Athenian losses. The *ekklesia* consequently impeached the Arginusae generals and removed them from command.

Theramenes and Thrasybulus, fearing for their lives, threw the full weight of their political influence against their superior officers.<sup>562</sup> Wary of Athenian justice, two of the Arginusae generals fled into voluntary exile.<sup>563</sup> When the other six returned, the *boule* instituted an *eisangelia* prosecution against them before the *ekklesia*.<sup>564</sup>

In the generals' first appearance before the *ekklesia*, Theramenes falsely denied that the violence of the storm had prevented the rescue of survivors. He argued instead that the generals were guilty of criminal negligence. The generals nevertheless made a good impression, presenting many of the steersman and sailors as witnesses. It had grown too dark by the end of the day to count hands when it came to voting. The *ekklesia* therefore instructed the *boule* to bring a motion specifying how the *ekklesia* should proceed.<sup>565</sup>

The delay proved fatal for the generals for two reasons. First, the Festival of Kinsmen (*Apaturia*), which celebrated family reunion and rejoicing, took place during the intervening period. The relatives of the men who perished at Arginusae attended the festival clad in black with shaved heads. Inspired by the dramatic effect of their appearance on the attendees at the festival, Theramenes and his supporters arranged for a number of people to pose as kinsmen of those lost after the battle. When the trial of the generals reconvened, Theramenes' posers

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<sup>562</sup> Theramenes' fear derived from his role in the oligarchic coup against democracy in 411 B.C. Thrasybulus, on the other hand, was an established democratic politician.

<sup>563</sup> These generals were Protomachus and Aristogenes. Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 357.

<sup>564</sup> Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 357.

<sup>565</sup> Xenophon, *A History of My Times (Hellenica)*, trans. Rex Warner (London: Penguin, 1979) 87.

attended the *ekklesia* attired in black and with shaved heads.<sup>566</sup>

The delay also provided Theramenes the opportunity for bribing Callixenus, a member of the *boule*, to attack the generals when the Council met to consider its proposal to the *ekklesia* for proceeding with the trial. When the *ekklesia* reconvened, the emotional effect of the pretended kinsmen on the *ekklesia* was overwhelming. Callixenus introduced the proposal of the *boule* that the *ekklesia* immediately decide the guilt or innocence of all eight defendants by a single ballot.”<sup>567</sup>

On cue, another man then shouted to the *ekklesia* that he had survived the battle by clinging to a barrel. He further claimed that the drowning Athenians had begged him, if he survived, to report to the people “that the generals were doing nothing to rescue men who had fought most gallantly for their country.”<sup>568</sup>

Some members of the *ekklesia*, including Euryptolemus, objected that trying all the generals together was illegal. Each general was legally entitled to a separate trial. The *ekklesia* responded that it was intolerable to forbid the *ekklesia* from exercising its will and threatened the objectors with the same fate as the generals. The intimidated objectors withdrew their objection.<sup>569</sup>

By luck of the lottery, Socrates was serving that day as the *epistates* or president of the *prytanes*, the committee of fifty *boule* members that presided over the *ekklesia*. Although

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<sup>566</sup> Xenophon, *A History of My Times (Hellenica)*, trans. Rex Warner (London: Penguin, 1979) 87.

<sup>567</sup> Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 357; Xenophon, *A History of My Times (Hellenica)*, trans. Rex Warner (London: Penguin, 1979) 87-88.

<sup>568</sup> Xenophon, *A History of My Times (Hellenica)*, trans. Rex Warner (London: Penguin, 1979) 88.

<sup>569</sup> Xenophon, *A History of My Times (Hellenica)*, trans. Rex Warner (London: Penguin, 1979) 88. Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 358. The forced withdrawal of the objection was itself illegal. Evelyn Abbot, *A History of Greece, Part III: From the Thirty Years Peace to the Fall of the Thirty at Athens, 445-403 B.C.* (New York: Putnam's, 1900) 449.

Socrates refused to put Callixenus' proposal for an immediate verdict to a vote, the impassioned *ekklesia* intimidated the other forty-nine members of the *prytanes*. The *ekklesia* first disregarded the prohibition against joint trials <sup>570</sup> and passed Callixenus' proposal. The *ekklesia* then disregarded the appeal of Euryptolemus that it not “turn victory into defeat, visit inevitable misfortune with cruel punishment, and treat inability as treachery.”<sup>571</sup> Instead, as it had done with Themistocles in 470 B.C. and Alcibiades in 415 B.C., the *ekklesia* convicted its benefactors on fraudulent evidence and condemned them to death.

Like the condemnation of Alcibiades nine years earlier, the execution of the generals had disastrous military consequences for Athens. One year later, without competent leadership, the Athenian fleet suffered a disaster against the Spartans at Aegospotami that forced Athens' surrender to Sparta.<sup>572</sup> Remorse for the execution of the generals seized Athens. “Not long afterwards the Athenians repented and voted to bring charges against those who had deceived the people.”<sup>573</sup> Athens regarded Callixenus with universal hatred and allowed him to starve to death.<sup>574</sup>

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<sup>570</sup> Xenophon records that the decree of Cannonus required a separate trial for each general. Each trial should have consisted of three parts: “one for the prosecution, one for the defense, and one for deliberating and voting on whether the accused are innocent or guilty.” Xenophon, *A History of My Times (Hellenica)*, trans. Rex Warner (London: Penguin, 1979) 90. The Cambridge Ancient History records, however, that the prohibition against joint trials was only in a decree, it therefore did not have binding effect as law. Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 358.

<sup>571</sup> Evelyn Abbot, *A History of Greece, Part III: From the Thirty Years Peace to the Fall of the Thirty at Athens, 445-403 B.C.* (New York: Putnam's, 1900) 448.

<sup>572</sup> Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 358-62; Xenophon, *A History of My Times (Hellenica)*, trans. Rex Warner (London: Penguin, 1979) 97-108.

<sup>573</sup> Donald Kagan, *The Peloponnesian War* (New York: Penguin, 2003) 466.

<sup>574</sup> Xenophon, *A History of My Times (Hellenica)* trans. Rex Warner (London: Penguin, 1979) 94; Evelyn Abbot, *A History of Greece, Part III: From the Thirty Years Peace to the Fall of the Thirty at Athens, 445-403 B.C.* (New York: Putnam's, 1900) 448.

### III. The Trial of Socrates (399 B.C.)

#### A. Conflicting Accounts of the Trial

The most famous of Athens' trials is the *graphe* prosecution of Socrates for impiety (*asebeia*) in 399 B.C. A fair evaluation of this trial requires a recognition that some details of events are beyond certain proof. Plato and Xenophon provide the only extant contemporaneous descriptions of Socrates' trial.<sup>575</sup>

Plato gives the only eyewitness account. Xenophon's account depends on Hermogenes for its facts. Plato, Xenophon, and Hermogenes were all members of Socrates' inner circle and presumably biased in Socrates' favor.<sup>576</sup> Furthermore, both Plato and Xenophon may have waited ten years before recording their accounts.<sup>577</sup>

The accounts of Plato and Xenophon differ on three significant subjects. First, the accounts differ in how Socrates describes himself to the jurors. Plato's Socrates humbly describes himself as wise only in that he recognizes his wisdom "is in truth worth nothing."<sup>578</sup>

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<sup>575</sup> Details of the trial also appear in Diogenes Laertius, *The Lives and Opinions of the Eminent Philosophers*, trans. C.D. Yonge (London: Bell, 1901) 72. Xenophon states in the opening of his "Socrates' Defence" that others have written accounts of the trial but he fails to name them. For a list of other authors of accounts of the trial, see Albin Leskey, *A History of Greek Literature*, trans. Cornelis de Heer and James Willis (Indianapolis: Hackett, 1996) 499, and W. A. Oldfather, "Socrates in Court," *Classical Weekly* 31 (21) (1938): 203-11. The Athenian orator Polycrates wrote a third account in 392 B.C., *The Accusation of Socrates*, but it does not survive. Polycrates' *Accusation* is reconstructed, however, in both Anton-Hermann Chroust, *Socrates, Man and Myth* (South Bend: U Notre Dame P, 1957) 69-100, and Robin Waterfield, *Why Socrates Died: Dispelling the Myths* (New York: Norton, 2009) 197-201.

<sup>576</sup> John Burnet and Gregory Vlastos argue for the accuracy of Plato's account by assuming that Plato's favorable depiction of Socrates shows Plato was motivated to defend Socrates' character. An untrue account, they argue, would have been counter-productive to this purpose because surviving attendees of the trial would have discredited it. John Burnet, *Plato's Euthyphro, Apology of Socrates, and Crito* (Oxford: Clarendon, 1924) 63-64; Gregory Vlastos, Introduction: The Paradox of Socrates, *The Philosophy of Socrates*, ed. Gregory Vlastos (Garden City: Anchor, 1971) 3. The difficulty with this argument is that it is entirely speculative and unsupported by any evidence. Plato, for example, never expresses his purpose in writing his account of the trial.

<sup>577</sup> Thomas C. Brickhouse and Nicolas D. Smith, *Socrates on Trial* (Princeton: Princeton UP, 1989) 1-2.

<sup>578</sup> Plato, "Apology," *The Trial and Death of Socrates: Four Dialogues*, trans. Benjamin Jowett (New York: Dover, 1992) 24. "And I am called wise, for my hearers always imagine that I myself possess the

Xenophon's Socrates, on the other hand, brashly presents himself as "the most free, upright, and prudent of all people."<sup>579</sup> "Socrates was so arrogant in court," writes Xenophon, "that he invited the jurors' ill-will and more or less forced them to condemn him."<sup>580</sup>

Second, the accounts differ in Socrates' attitude towards death. Plato's Socrates reluctantly accepts an unjust death as preferable to an unrighteous escape.<sup>581</sup> Xenophon's Socrates, however, welcomes his execution as the "easiest possible death," a divine kindness providing escape from "the penalties of old age."<sup>582</sup> Prior to the trial, Xenophon's Socrates "had already decided that for him death was preferable to life."<sup>583</sup>

Third, the accounts differ in Socrates' evaluation of Athens' laws. Xenophon's Socrates recognizes that "the Athenian courts have often been prevailed upon by argument to put innocent men to death, and equally have often acquitted the wrongdoers, either out of pity aroused by the speeches or because they've been flattered."<sup>584</sup> Plato's Socrates, on the other hand, describes Athens' laws and institutions, like virtue itself, as "the best things among men."<sup>585</sup> The laws

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wisdom which I find wanting in others: but the truth is, O men of Athens, that God only is wise; and in this oracle he means to say that the wisdom of men is little or nothing; he is not speaking of Socrates, he is only using my name as an illustration, as if he said, He, O men, is the wisest, who, like Socrates, knows that his wisdom is in truth worth nothing."

<sup>579</sup> Xenophon, "Socrates' Defense," *Conversations of Socrates* (London: Penguin, 1990) 44.

<sup>580</sup> Xenophon, "Socrates' Defense," *Conversations of Socrates* (London: Penguin, 1990) 49.

<sup>581</sup> Plato, "Crito," *The Trial and Death of Socrates: Four Dialogues*, trans. Benjamin Jowett (New York: Dover, 1992) 52-53. Socrates explains that he has agreed to obey the laws by living in Athens, and escaping to avoid execution would be turning his back on the compacts and agreements he made as a citizen. Socrates argues further that we must not commit injustice in return for an injustice committed upon us. *Id.* at 49.

<sup>582</sup> Xenophon, "Socrates' Defense," *Conversations of Socrates* (London: Penguin, 1990) 42. See Sam Silverman, "The Death of Socrates: A Holistic Reexamination," *Omega* 61 (1) (2010): 71-84 for an argument that Socrates welcomed his execution. Socrates wished to die, but his philosophy forbade suicide.

<sup>583</sup> Xenophon, "Socrates' Defense," *Conversations of Socrates* (London: Penguin, 1990) 41.

<sup>584</sup> Xenophon, "Socrates' Defense," *Conversations of Socrates* (London: Penguin, 1990) 41-42.

<sup>585</sup> Plato, "Crito," *The Trial and Death of Socrates: Four Dialogues*, trans. Benjamin Jowett (New York: Dover, 1992) 53. In describing a hypothetical dialogue with the laws of Athens, Socrates states the

“speak truly,” and Socrates must submit to their authority as their child and slave, even at the cost of his own destruction.<sup>586</sup> Even after his unjust condemnation, Plato’s Socrates sees himself as “a victim, not of laws, but of men.”<sup>587</sup>

Contrary to the assessment of Plato's Socrates, and as demonstrated below, Socrates was the victim of *both* laws and men. The evidence of history supports Xenophon’s description of the Athenian courts. By denying even primitive due process protections to the accused, Athens’ legal system exposed the *innocent* to an unconscionably high risk of condemnation. Rather than treating Athenians as ends in themselves, Athenian law permitted their exploitation as means to political ends. As seen with the trials of Alcibiades and the Arginusae generals detailed above, Athens’ legal system ultimately brought disaster to the condemned and the condemner alike.

### **B. Three Puzzles Presented by Socrates' Trial**

Socrates’ trial presents three puzzles. The first puzzle involves the motive behind the prosecution. Many commentators conclude that Socrates’ accusers sought his death because Socrates posed a threat to democracy. Socrates, however, was no revolutionary. As portrayed in the *Crito*, Socrates felt obliged to obey the laws as their child and slave.

The second puzzle involves the choice of proceeding. Socrates' chief accuser Anytus

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following: “For he who is a corrupter of the laws is more than likely to be a corrupter of the young and foolish portion of mankind. Will you then flee from well-ordered cities and virtuous men? And is existence worth having on these terms? Or will you go to them without shame, and talk to them, Socrates? And what will you say to them? What you say here about virtue and justice and institutions and laws being the best things among men?”

<sup>586</sup> Plato, “Crito,” *The Trial and Death of Socrates: Four Dialogues*, trans. Benjamin Jowett (New York: Dover, 1992) 51. “Well then, since you were brought into the world and nurtured and educated by us, can you deny in the first place that you are our child and slave, as your fathers were before you? And if this is true you are not on equal terms with us; nor can you think that you have a right to do to us what we are doing to you. Would you have any right to strike or revile or do any other evil to a father or to your master, if you had one, when you have been struck or reviled by him, or received some other evil at his hands? — you would not say this? And because we think right to destroy you, do you think that you have any right to destroy us in return, and your country as far as in you lies?”

<sup>587</sup> Plato, “Crito,” *The Trial and Death of Socrates: Four Dialogues*, trans. Benjamin Jowett (New York: Dover, 1992) 54.



was a sophisticated veteran of Athenian political prosecutions. The *eisangelia* procedure presented significant advantages for the accusers. Nevertheless, the accusers chose to prosecute Socrates in a *graphe* proceeding.

The third puzzle involves Socrates' defense. Socrates' indictment charged Socrates with impiety (*asebeia*) and sought the death penalty. Socrates' defense, however, focuses on charges that Socrates considers more dangerous than those in the indictment. The answers to these puzzles illuminate significant shortcomings in the Athenian legal system.

### **C. The Puzzling Motive behind the Prosecution of Socrates**

#### **1. Political Turmoil in Athens (415 - 403 B.C.)**

The answer to the puzzle regarding the prosecutors' motive lies in the political turmoil that tormented Athens in the fifteen years preceding Socrates' trial. This political instability reached its greatest intensity in the aftermath of the *eisangelia* prosecutions of Alcibiades in 415 B.C. and the Arginusae generals in 406 B.C. Five regime changes rocked Athens between 411 B.C. and 403 B.C. as Athens reeled between alternating oligarchic and democratic regimes.

#### **2. Oligarchy of the 400 (411 B.C.)**

Democratic mismanagement of the Peloponnesian War, particularly the *eisangelia* prosecution of Alcibiades with its disastrous consequences for the Sicilian campaign, enabled the "oligarchy of the 400" to overthrow the democratic government and take power in 411 B.C.<sup>588</sup> Led by the rhetorician Antiphon, the oligarchic conspirators first sought to discredit democracy in the popular mind. To accomplish this goal they instituted a series of *eisangeliai* prosecutions against democratic officials for embezzlement.<sup>589</sup>

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<sup>588</sup> Thucydides, *History of the Peloponnesian War*, trans. Rex Warner (New York: Penguin, 1972) 574-77.

<sup>589</sup> Robert J. Bonner, *Lawyers and Litigants in Ancient Athens* (New York: Benjamin Blom, 1969) 100.

The conspirators claimed legitimacy under Solon's "ancestral constitution of Athens"<sup>590</sup> and modeled their "oligarchy of the 400" on the aristocratic Council of 400 established by Solon. Since the *boule* had replaced Solon's Council of 400 under Cleisthenes' reforms in 508 B.C., Antiphon's oligarchs targeted the *boule* in a coup d'état.

The 400 executed the coup d'état by confronting the *boule* with an armed gang of 120 "Hellenic youths." The oligarchs paid the members of the *boule* their stipend and sent them home at dagger point. Thucydides records that "no objection was raised."<sup>591</sup> Once the 400 secured their power, they recalled Alcibiades and gave him command of the Athenian fleet.<sup>592</sup> The oligarchy then instituted a brutal program of exiling, imprisoning, and executing its political adversaries.

### **3. Oligarchy of the 5,000 (411 B.C.)**

A dispute soon developed within the regime of the 400. A moderate faction, led by Theramenes and Aristocrates, called for the replacement of the 400 with a broader oligarchy of "the 5,000." This oligarchy would include all citizens of the highest three classes. The extremist faction, led by Antiphon and Phrynichus, responded by opening peace negotiations with Sparta. In exchange for Spartan support, the extremists agreed to construct a fortification in the harbor of Piraeus and turn it over to the Spartans. The extremists began constructing the fortification.

The moderates assassinated the extremist leader Phrynichus. Emboldened by this success, the moderates then arrested the extremist general Alexices. A confrontation ensued, which ended with the hoplites in Piraeus tearing down the new fortification. The moderates tried

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<sup>590</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 44.

<sup>591</sup> Thucydides, *History of the Peloponnesian War*, trans. Rex Warner (New York: Penguin, 1972) 578. *Accord*, Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 44.

<sup>592</sup> Donald Kagan, *The Peloponnesian War* (New York: Viking, 2003) 389; Plutarch, "Alcibiades," *Plutarch's Lives of Illustrious Men*, trans. John Dryden, vol. 1 (Philadelphia: Coates, 1900) 323.

and executed the extremist Antiphon for treason with Sparta,<sup>593</sup> and the oligarchy of the 400 lost power after only four months.

The oligarchy of the 5000 remained in power for four more months.<sup>594</sup> During their rule, the Athenian navy won a crushing victory at Cyzicus under the brilliant leadership of Alcibiades.<sup>595</sup> Aristotle records that the oligarchy of the 5000 governed well. Nevertheless, after the victory at Cyzicus relieved the people of their fears of an immediate military crisis, they “deprived the 5000 of their monopoly of the government” and restored democracy in 410.<sup>596</sup>

#### **4. Democracy Restored (410-404 B.C.)**

The restored democracy quickly returned to destroying its competent military leaders through political prosecutions. Despite his decisive victory at Cyzicus in 410 B.C., Alcibiades’ political enemies succeeded in unjustly fixing him with blame for Athens’ naval defeat at Notium in 406 B.C.<sup>597</sup> Alcibiades’ enemies persuaded Athens to deprive Alcibiades of command, just as they had done in the Sicilian campaign of 415 B.C.

Athens had convicted Alcibiades in an *eisangelia* prosecution on fraudulent evidence and sentenced him to death in 415 B.C. His enemies now brought another fraudulent *eisangelia* prosecution against him in 406 B.C. Rather than fight another fraudulent political prosecution, Alcibiades chose to remove himself permanently from Athenian affairs by voluntary exile.<sup>598</sup>

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<sup>593</sup> Plutarch, *Morals*, “Lives of the Ten Orators,” trans. Charles Barcroft, vol. 5 (Boston: Little, Brown, 1874) 17-21.

<sup>594</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 45.

<sup>595</sup> C. Hignett, *A History of the Athenian Constitution to the End of the Fifth Century B.C.* (Oxford: Clarendon, 1975) 280.

<sup>596</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 45.

<sup>597</sup> The defeat at Notium is actually attributable to Antiochus, Alcibiades’ helmsman, whom Alcibiades placed in temporary command during Alcibiades’ absence. Antiochus lost the battle because he disobeyed Alcibiades’ order not to attack the Spartan fleet under Lysander. George Cawkwell, *Thucydides and the Peloponnesian War* (New York: Routledge, 1997) 143.

<sup>598</sup> Diodorus Siculus, *The Historical Library of Diodorus*, trans. G. Booth (London: McDowell, 1814) 546-47. Plutarch, “Alcibiades,” *Plutarch’s Lives of Illustrious Men*, trans. John Dryden, vol. 1 (Philadelphia:

Athens soon compounded the loss of Alcibiades by executing the best of her remaining military leaders in the trial of the Arginusae generals detailed above. The Athenian fleet, now demoralized by incompetent leaders and irregular pay, suffered a “sudden and complete” defeat the following year at Aegospotami. This defeat lost the Peloponnesian War and caused the downfall of the Athenian democracy.<sup>599</sup>

### 5. The Oligarchy of the Thirty Tyrants (404 B.C.)

The peace treaty ending the Peloponnesian War with Sparta ambiguously provided that Athens' “ancient constitution” would determine her form of government. The popular party tried to preserve the democracy, but the upper class favored oligarchy. When the Spartan leader Lysander threw his influence to the oligarchic party, “the popular assembly was compelled by sheer intimidation to pass a vote establishing the oligarchy.”<sup>600</sup>

Some of the leading actors in the drama that followed played an important role in the trial of Socrates. Critias, a former pupil of Socrates described by Xenophon as “the most avaricious and violent of the oligarchs,” was the leader of the Thirty Tyrants.<sup>601</sup> Charmides, another of Socrates' students, was also prominent in the oligarchy.<sup>602</sup> Aristotle explains that the Thirty Tyrants, like the oligarchy of the 400 seven years earlier, initially pretended to restore the

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Coates, 1900) 332; Donald Kagan, *The Peloponnesian War* (New York: Viking, 2003) 446-47: “Alcibiades again went into exile, knowing better than to return to Athens where his many opponents were waiting with a flurry of private lawsuits and who knew what public charges.”

<sup>599</sup> C. Hignett, *A History of the Athenian Constitution to the End of the Fifth Century B.C.* (Oxford: Clarendon, 1975) 283; Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 46; Donald Kagan, *The Peloponnesian War* (New York: Viking, 2003) 447; and Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 358-365.

<sup>600</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 46-47.

<sup>601</sup> Xenophon, *Conversations of Socrates*, trans. Hugh Tredennick and Robin Waterfield (London: Penguin, 1990) 38.

<sup>602</sup> Xenophon, *Conversations of Socrates*, trans. Hugh Tredennick and Robin Waterfield (London: Penguin, 1990) 38.

“ancient constitution.” The Thirty succeeded in duping the city for a season. “With all of this the city was much pleased, and thought that the Thirty were doing it with the best of motives.”<sup>603</sup>

Once the Thirty Tyrants secured their power, however, their true brutality emerged. The Thirty killed the wealthy to take their possessions and killed every other eminent citizen who posed a potential threat to their power. The Thirty killed 1500 Athenians in only eight months.<sup>604</sup>

Socrates disobeyed the Thirty Tyrants on two occasions. First, Socrates refused to stop conversing with the young when the Thirty ordered him to do so. Second, the Thirty ordered Socrates and four others to arrest Leon of Salamis, a democrat. Socrates refused to do so and went home instead. The Thirty nevertheless arrested Leon and put him to death.<sup>605</sup>

Despite their brutal killing of political rivals, the Thirty failed to root out their political opponents among the Athenian exiles that occupied Phyle. Fearing that they might lose power, the Thirty passed a law disarming all but a Council of 3000 with whom they promised to share power. After disarming the people, the Thirty “showed in every respect a great advance in cruelty and crime.” The Thirty granted the 3000 the power to put any other Athenians to death without trial. The Thirty also admitted 700 Spartan troops into Athens to help them maintain power, allowing the Spartans to occupy the Acropolis, the holiest ground in the city.<sup>606</sup>

## **6. Second Restoration of Democracy (403 B.C.)**

The exiles under Thrasybulus overthrew the Thirty Tyrants by force in 403 B.C. at the

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<sup>603</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 47-48.

<sup>604</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 47-48: “But so soon as they had got a firmer hold on the city, they spared no class of citizens, but put to death any persons who were eminent for wealth or birth or character. Herein they aimed at removing all whom they had reason to fear, while they also wished to lay hands on their possessions; and in a short time they put to death not less than 1500 persons.”

<sup>605</sup> Xenophon, “Memoirs of Socrates,” *Conversations of Socrates*, trans. Hugh Tredennick and Robin Waterfield (London: Penguin, 1990) 195.

<sup>606</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 49-50.

battle of Munychia, a hill overlooking the Athenian port of Piraeus.<sup>607</sup> Anytus, Socrates' later accuser, gained prominence by playing a leading role in the overthrow of the Thirty. The exiles killed Critias during the battle. The remaining Thirty fled to Eleusis, and the Athenians elected a temporary governing board of ten men in their place. The Thirty had ruled for eight months.

After a brief fight with the Athenians, the Spartan king Pausanias arranged a settlement that restored democracy in Athens.<sup>608</sup> The people decreed that "Athens be governed as of old" under the "laws of Solon" and the "statutes of Draco."<sup>609</sup> The *archon* Eucleides established a general amnesty, and those who wished to secede from Athens left in peace to settle at Eleusis.<sup>610</sup>

Democracy's hold on Athens remained tenuous despite this second restoration. Athens thwarted yet another attempt to overthrow the restored democracy in 401 B.C. by executing its leaders.<sup>611</sup> The leaders of this effort to overthrow democracy, like Alcibiades, Critias, and Charmides before them, also had close ties to Socrates. The Athenians tried Socrates soon afterwards.

## 7. Conclusion: The Motives of Socrates' Accusers

Many scholars address the motives behind Socrates' prosecution and reach contradictory

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<sup>607</sup> Although the forces of the Thirty Tyrants outnumbered the exiles by five to one, the exiles held the high ground. The battle is described in detail in Xenophon, *A History of My Times (Hellenica)*, trans. Rex Warner (London: Penguin, 1979) 125-35, and Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 369-372.

<sup>608</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 49-51.

<sup>609</sup> The decree provided as follows: "Decree. On the motion of Teisamenus the People decreed that Athens be governed as of old, in accordance with the laws of Solon, his weights and his measures, and in accordance with the statutes of Draco, which we used aforetime." Andocides, "On the Mysteries," *Minor Attic Orators*, 2 vols., trans. K. J. Maidment (Cambridge: Harvard UP, 1968) 1.83.

<sup>610</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 51-52; Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 392.

<sup>611</sup> Xenophon, *A History of My Times (Hellenica)*, trans. Rex Warner (London: Penguin, 1979) 135.

conclusions.<sup>612</sup> Nevertheless, the foregoing demonstrates the difficulties encountered by the democratic party in maintaining a democratic government in Athens from 411 B.C. until Socrates' trial in 399 B.C. The tenuous grip of democracy on power suggests that the most probable motive behind the prosecution was the removal of Socrates as an opponent of democracy.<sup>613</sup> Anytus, Socrates' chief accuser, played a prominent role in deposing the Thirty

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<sup>612</sup> See, e.g., Xenophon, *Xenophon's Memorabilia of Socrates*, with English Notes, ed. Charles Athlon (New York: Harper's, 1876); Robin Waterfield, *Why Socrates Died: Dispelling the Myths* (New York: Norton, 2009); E. R. Dodds, *The Greeks and the Irrational*, (Berkeley: U. Cal. P., 1951); I.F. Stone, *The Trial of Socrates* (Boston: Little, 1988); and Thomas C. Brickhouse and Nicolas D. Smith, *The Trial and Execution of Socrates: Sources and Controversies* (New York: Oxford UP, 2002). In Xenophon, *Xenophon's Memorabilia of Socrates*, with English Notes, ed. Charles Athlon (New York: Harper's, 1876), Athlon states four "indirect" motives at 432 n. 1 for the prosecution of Socrates that are not explicitly stated in Meletus' indictment: (1) selfishness and the envy by the Athenian population of outstanding men, which Athlon attributes to the decline of the Athenian character and lack of moral cultivation during the Peloponnesian War; (2) Athenian hatred of the Sophists; (3) Aristophanes' influential ridiculing of Socrates in his play "The Clouds;" and (4) Socrates' opposition to democracy and his personal relationship with tyrants, including Critias. In Robin Waterfield, *Why Socrates Died: Dispelling the Myths* (New York: Norton, 2009), Waterfield argues at p. 202 that Socrates was punished (1) for an intergenerational conflict caused by social factors rather than by individuals; (2) as a morally subversive teacher; (3) as a critic of democracy; and (4) because the Athenians wanted to purge themselves of undesirable trends, not just an undesirable individual. In E. R. Dodds, *The Greeks and the Irrational*, (Berkeley: U. Cal. P., 1951) Dodds argues at p. 182 that Socrates was the victim of a thirty year period of heresy trials that was marked by "banishment of scholars, lingering of thought and even (if we can believe the tradition of Protagoras) burning of books." In I.F. Stone, *The Trial of Socrates* (Boston: Little, 1988), Stone rejects Dodds' heresy explanation and argues at pp. 138 and 140-173 that Socrates' prosecutors desired to eliminate Socrates' anti-democratic political views after the three oligarchic regimes between 411 B.C. and 404 B.C. In Thomas C. Brickhouse and Nicolas D. Smith, *The Trial and Execution of Socrates: Sources and Controversies* (New York: Oxford UP, 2002), the authors argue at page 209 that the motive was primarily religious.

<sup>613</sup> Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 391: "The [people] considered him disloyal to democracy, and that his criticisms were more to be feared than the plots of the oligarchic conspirator. It was therefore deemed highly desirable to rid Athens of the citizen whose influence and careless tongue were felt to be a danger, though he took no part in politics and was the least likely of men to do the same contrary to the law. Anytus, an honest and moderate Democrat and at this moment perhaps the most important Athenian statesman next to Thrasybulus, was the prime mover in preparing the prosecution intended to silence the embarrassing." Libanius, a rhetorician of the fourth century A.D., wrote an *Apology* that emphasizes the political aspects of Socrates' prosecution by the democratic party in Athens. Libanius attempts to defend Socrates against the following charges. First, Socrates was a man "who smiled on three tyrants." Second, "Socrates hated democracy, and would have liked to have seen a tyrant at the head of the republic." Third, Socrates "praised" the tyrant Pisistratus, "admired" the tyrant Hippias, "honored" the tyrant Hipparchus, and called the period of their tyranny [546-510 B.C.] the happiest period in Athenian history. Xenophon, *Xenophon's Memorabilia of Socrates*, with English Notes, ed. Charles Athlon (New York: Harper's, 1876) 432 n. 1.

Tyrants, restoring democracy, and attempting to achieve social concord by reconciling oligarchs and democrats.<sup>614</sup> Anytus probably perceived Socrates as a threat to a stable democracy.<sup>615</sup>

Socrates' relationship with prominent members of the recent oligarchies certainly bolstered this perception. Two members of the Thirty Tyrants were close friends and former students of Socrates, including the leader Critias and Plato's uncle Charmides.<sup>616</sup> Plato depicts Critias as a long time acquaintance of Socrates in the *Charmides*, and Socrates is attracted to Charmides in Plato's *Charmides* and *Symposium*.<sup>617</sup> Alcibiades, recalled from exile by the Oligarchy of the 400 in 411 B.C. and given command of the fleet,<sup>618</sup> publicly ridiculed Athenian democracy to the Spartans as an "acknowledged folly."<sup>619</sup> Plato depicts Alcibiades as one of Socrates' lovers in Plato's *Protagoras*, *Gorgias*, and *Symposium*.

Personal animosity may have provided another motive for the prosecution. Anytus was a politician and Meletus was a poet. Socrates admits in Plato's *Apology* that he had made enemies and obtained "an evil name" by publicly deriding their professions.<sup>620</sup> According to Xenophon, Anytus took pride in killing Socrates. Socrates once offended Anytus by telling Anytus that he

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<sup>614</sup> Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 391; Peter John Rhodes, *A Commentary on the Aristotelian Athenaion Politeia* (Oxford: Oxford UP, 1981) 431-32.

<sup>615</sup> Robin Waterfield, *Why Socrates Died: Dispelling the Myths* (New York: Norton, 2009) 194, 202; J. Burnet, *Plato: Euthyphro, Apology of Socrates, Crito* (Oxford: Clarendon, 1924) 100-01.

<sup>616</sup> Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 390. Plato relates in the *Symposium* that Socrates saved Alcibiades' life at the Battle of Delium in 424 B.C.

<sup>617</sup> Thomas C. Brickhouse and Nicolas D. Smith, *The Trial and Execution of Socrates: Sources and Controversies* (New York: Oxford UP, 2002) 202.

<sup>618</sup> Donald Kagan, *The Peloponnesian War* (New York: Viking, 2003) 389.

<sup>619</sup> Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 390.

<sup>620</sup> Plato, *Apology, The Trial and Death of Socrates: Four Dialogues*, trans. Benjamin Jowett (New York: Dover, 1992) 22-24. Socrates had gone to politicians, poets, and artisans to test the Delphic oracle's proclamation that no man possessed greater wisdom than Socrates did. Members of each profession had disappointed Socrates by proving themselves no wiser than Socrates.



should not raise his son to be a tanner like his father.<sup>621</sup>

Plato also describes a disputation between Socrates and Anytus in the *Meno*. At the end of the discussion, Anytus angrily tells Socrates that he is too apt to speak ill of people. Anytus ends the conversation by threatening Socrates: “If you'll take my advice, I would recommend you to be careful. Perhaps there is no city in which it is not easier to do men harm than to do them good, and this is certainly the case in Athens, as I believe that you know.”<sup>622</sup>

This threat by Anytus clearly refers to *graphai*, *ostrakismos*, and *eisangeliai* proceedings in the Athenian legal system. Of the three proceedings, the *graphe* procedure presented the greatest difficulty and risk to Socrates' accusers. Their selection of the *graphe* procedure for their prosecution presents the second puzzle in Socrates' trial.

#### **D. The Puzzling Choice of the *Graphe* Procedure**

Athenian political prosecutions generally took one of three forms: ostracism, *eisangelia* prosecutions, or *graphe* prosecutions. Of the three forms, only the *graphe* prosecution presented a significant risk to the prosecutor. Athens fined prosecutors as much as 1,000 drachmas if they failed to obtain at least one fifth of the *dikast's* votes. The prosecutor also suffered a partial dishonor (*atimia*) and lost any standing to bring *graphai* in the future.<sup>623</sup>

Given the disadvantages of a *graphe* prosecution, it is perhaps surprising that Anytus, Socrates' chief accuser, chose to institute a *graphe* against Socrates. Anytus was a cunning litigator and experienced in *eisangelia* prosecutions. He was the first man in Athenian history to “fix” a case, bribing an entire *dikastery* in 409 B.C. to escape his own *eisangelia* prosecution.

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<sup>621</sup> Xenophon, “Apology of Socrates to the Jury,” *The Shorter Socratic Writings: Apology of Socrates to the Jury, Oeconomicus, and Symposium*, trans. Robert C. Bartlett (Ithaca: Cornell UP, 1996) 17.

<sup>622</sup> Plato, *Meno, Five Great Dialogues of Plato* (Claremont, CA: Coyote Canyon P., 2003) 86.

<sup>623</sup> Douglas MacDowell, *The Law in Classical Athens* (London: Thames and Hudson, 1978) 58; S.C. Todd, *The Shape of Athenian Law* (Oxford: Clarendon, 1993) 114.

His prosecution involved the loss of Pylos under his command during the Peloponnesian War.<sup>624</sup>

There are two reasons that Anytus selected *graphe* over ostracism and *eisangelia*. First, the limited availability of ostracism rendered it impracticable. Ostracism was only available on one day a year, and Athens could only ostracize one man per year.<sup>625</sup>

Second, the “reinscription” of Athenian law in 403 B.C. rendered an *eisangelia* prosecution against Socrates impracticable as well. The “reinscription” was a consequence of Athens’ defeat in the Peloponnesian War the previous year. The Thirty Tyrants suspended Athens’ democratic constitution when they assumed power in 404 B.C. After the Athenians forcibly restored democracy in 403 B.C., they no longer viewed their laws as adequate. A decree passed on the proposal of Teisamenos to review the laws and recommend supplementation.<sup>626</sup> Two boards of “law-makers” (*nomothetai*) prepared supplemental laws, and the *boule* scrutinized their proposals.<sup>627</sup>

The *archons* inscribed the approved supplements on a wall at the royal stoa (*stoa basileios*).<sup>628</sup> The *archons* completed the reinscription in 403 B.C. during the archonship of

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<sup>624</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 36. Anytus’ method of bribery, *dekazein*, literally means “to make into one’s cronies.” Modern scholars do not fully understand its details, but Athens later criminalized such bribery and made it punishable by death. Douglas M. MacDowell, *The Law in Classical Athens* (Ithaca, NY: Cornell UP, 1978) 173; Debra Nails, *The People of Plato* (Indianapolis: Hackett, 2002) 37.

<sup>625</sup> The Athenian Assembly could conduct an ostracism once a year, during the sixth month of the official calendar. Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 29-30.

<sup>626</sup> This project originally began in 410 B.C. but developments during the Peloponnesian War interrupted its progress. Douglas MacDowell, *The Law in Classical Athens* (London: Thames and Hudson, 1978) 46-47.

<sup>627</sup> Douglas MacDowell, *The Law in Classical Athens* (London: Thames and Hudson, 1978) 46-47; Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 382; Douglas MacDowell, *The Law in Classical Athens* (London: Thames and Hudson, 1978) 373.

<sup>628</sup> Douglas MacDowell, *The Law in Classical Athens* (London: Thames and Hudson, 1978) 48. The royal stoa was located on the northwest corner of the Agora. The magistrates inscribed a revised sacrificial calendar on the back of the wall.

Eucleides, who then declared the beginning of a “new era.” Any decrees or laws predating the “new era” were invalid, unless they were included in the new inscriptions.<sup>629</sup>

Athens also made it more difficult to amend her laws. The ease of amending the law had contributed to the establishment of the Thirty Tyrants in 404 B.C.<sup>630</sup> Lastly, Eucleides declared a general amnesty for all persons except the Thirty Tyrants. The amnesty forbade prosecutions for any offenses committed before the “new era.”<sup>631</sup>

Prior to the “new era” and the reinscription of Athens' laws, the decree of Diopeithes provided an ideal vehicle for prosecuting Socrates. This decree, *circa* 430s, authorized an *eisangelia* prosecution against any person who did not conform to the religious practices of the city, believe in the gods, or who taught new doctrines about things in the sky.<sup>632</sup> As described below, Diopeithes created his decree for the specific purpose of prosecuting the philosopher Anaxagoras.

The reinscription of 403 B.C., however, repealed the decree of Diopeithes. The most

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<sup>629</sup> Douglas MacDowell, *The Law in Classical Athens* (London: Thames and Hudson, 1978) 46-47.

<sup>630</sup> Douglas MacDowell, *The Law in Classical Athens* (London: Thames and Hudson, 1978) 48. Under the old method, a simple majority vote at one meeting of the *boule* and one meeting of the *ekklesia* was enough to abolish any existing law, however fundamental, or to make any new one, however drastic.

<sup>631</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 51-52; Douglas MacDowell, *The Law in Classical Athens* (London: Thames and Hudson, 1978) 47; Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 392. Historians debate the scope of the amnesty. Waterfield, among others, contends that the scope of the amnesty was limited. Robin Waterfield, *Why Socrates Died: Dispelling the Myths* (New York: W.W. Norton, 2009) 134. Thomas R. Martin, on the other hand, describes the amnesty as “general...under which all further charges and official recriminations concerning the [reign of] terror were forbidden.” Thomas R. Martin, *Ancient Greece: From Prehistoric to Hellenistic Times* (New Haven: Yale UP, 2009) 162.

<sup>632</sup> Plutarch, “Pericles,” *Plutarch's Lives of Illustrious Men*, trans. John Dryden, vol. 3 (Philadelphia: Coates, 1900) 264: “And Diopeithes proposed a decree, that public accusation should be laid against persons who neglected religion, or taught new doctrines about things above, directing suspicion, by means of Anaxagoras, against Pericles himself.” Accord, Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 382; Douglas MacDowell, *The Law in Classical Athens* (London: Thames and Hudson, 1978) 200. Harold Mattingly places the date of Diopeithes' decree as 427 B.C. Harold B. Mattingly, *The Athenian Empire Restored: Epigraphic and Historical Studies* (Ann Arbor: U. Mich. P., 1996) 526-27.

attractive vehicle for prosecuting Socrates after the reinscription was the law against impiety (*asebeia*). *Asebeia* prosecutions against philosophers had succeeded in the past. The *asebeia* law, however, only authorized “public” or *graphe* proceedings in the *heliaea*.<sup>633</sup> The more advantageous *eisangelia* proceeding was therefore unavailable for Socrates' accusers.

Anytus therefore arranged for Meletus, a known religious reactionary, to initiate a *graphe* prosecution against Socrates for *asebeia* in the *heliaea*. Anytus' assistance in the prosecution capitalized on his political influence as leader of the democratic party. Cognizant of the potential penalties if the *graphe* prosecution of Socrates failed, Anytus procured the assistance of Lycon, a rhetorician of whom we know little else.<sup>634</sup>

### **E. Socrates' Puzzling Defense**

The third puzzle of Socrates' trial involves Socrates' defense. Socrates' indictment charged Socrates with impiety (*asebeia*) and sought the death penalty. Socrates' defense, however, focused on charges outside the indictment that Socrates considered more dangerous.

Plato, Xenophon, and Diogenes Laertius agree that Meletus' indictment charged Socrates with three wrongful acts. First, Socrates did not believe in the gods of the state. Second, Socrates introduced new divinities. Third, Socrates corrupted the youth.<sup>635</sup>

Socrates nevertheless began his defense by addressing a different set of charges.

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<sup>633</sup> Douglas MacDowell, *The Law in Classical Athens* (London: Thames and Hudson, 1978) 199.

<sup>634</sup> Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 391.

<sup>635</sup> Plato recites the official charges stated in Meletus' indictment as follows: “That Socrates is a doer of evil, and corruptor of the youth, and he does not believe in the gods of the state, and he has other new divinities of his own.” Plato, *The Trial and Death of Socrates: Four Dialogues*, trans. Benjamin Jowett (New York: Dover, 1992) 25. Xenophon gives a similar description: Socrates “did not believe in the gods the city believed in, but that he introduced other strange divinities, and corrupted the young.” Plato and Xenophon, *Apologies*, trans. Mark Kremer (Newburyport, MA: Focus, 2006) 31. Diogenes states Meletus' indictment of Socrates as follows: “Socrates is guilty inasmuch as he does not believe in the Gods whom the city worships, but introduces other strange deities; he is also guilty, inasmuch as he corrupts the young men, and the punishment he has incurred is death.” Diogenes Laertius, *The Lives and Opinions of the Eminent Philosophers*, trans. C.D. Yonge (London: Bell, 1901) 72.

Socrates described these as the charges of his “old accusers” and stated them as follows: “Socrates is an evil-doer, and a curious person, who searches into things under the earth and in heaven, and he makes the worse appear the better cause; and he teaches the aforesaid doctrines to others.”<sup>636</sup> Socrates regarded these charges as a greater danger than those in the indictment. The accusers leveling these accusations, says Socrates, “are the accusers whom I dread.”<sup>637</sup>

As shown below, Socrates had three reasons to dread these charges. First, Athens gave no legal protection to free thought or free expression, choosing instead to criminalize them. Athenian *dikasts* had recently convicted philosophers on the same charges as those leveled by Socrates’ “old accusers.”

Second, Athens’ trial procedures lacked even basic due process protections. The absence of these protections permitted the *dikasts*, *inter alia*, to convict Socrates on charges outside the indictment and for reasons outside the evidence. Third, the *dikasts* often rendered unjust verdicts. Rather than basing their decisions on reliable evidence, the *dikasts* based their decisions on flattery, pity, and bribery.

### **1. Athenian Criminalization of Thought and Expression**

The *ad hoc* criminalization of thought and expression by the *ekklesia* and the *heliaea* justified Socrates’ “dread” of the older accusations. Neither freedom of thought nor freedom of expression was a protected legal right in Athens. To the extent that either of these freedoms existed, it existed only in the absence of restricting laws.<sup>638</sup>

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<sup>636</sup> Plato, *The Trial and Death of Socrates: Four Dialogues*, trans. Benjamin Jowett (New York: Dover, 1992) 21.

<sup>637</sup> Plato, *The Trial and Death of Socrates: Four Dialogues*, trans. Benjamin Jowett (New York: Dover, 1992) 21: “And first, I have to reply to the older charges and to my first accusers... who began when you were children, and took possession of your minds with their falsehoods, telling of one Socrates, a wise man, who speculated about the heaven above, and searched into the earth beneath, and made the worse appear the better cause. These are the accusers *whom I dread*...” [Emphasis added].

<sup>638</sup> James A. Colaico, *Socrates against Athens: Philosophy on Trial* (New York: Routledge 2001) 122.

Any citizen making a public proposal or speaking in the *ekklesia* was subject to an *eisangelia* prosecution before the *ekklesia* or the *heliaea* for giving bad advice, accepting a bribe in exchange for his speech, or making a proposal that conflicted with existing laws. Potential penalties included large fines, loss of citizenship privileges, and even death. Citizens were also subject to the same penalties in a *graphe paranomon* prosecution before the *heliaea* for making any proposal that contravened existing law.<sup>639</sup> Since these procedures lacked due process protections, the potential for prosecution for every utterance exerted a significant chilling effect on freedom of thought and expression.

Socrates was not the first significant philosopher prosecuted in Athens for his thought and expression under the guise of *asebeia*. Prosecutors brought actions against Anaxagoras and Protagoras for *asebeia* prior to the trial of Socrates. The old accusers' accusations that Socrates “speculated about the heaven above, searched into the earth beneath, and made the worse appear the better cause” closely track the charges alleged in these earlier trials.<sup>640</sup> As explained below, the charges that Socrates “searches into things under the earth and in heaven, and he makes the worse appear the better cause” reflect the charges levied against the natural philosopher Anaxagoras *circa* 430 B.C. The charge that Socrates “makes the worse appear the better cause” almost certainly reflects the charges urged against the Sophist Protagoras *circa* 415 B.C.

## **2. The Trial of Anaxagoras (*circa* 430 B.C.)**

Pericles' personal interest in philosophical questions and his regard for expert knowledge led him to seek to make Athens the center of the Hellenic “Age of Illumination” *circa* 530 to 400

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<sup>639</sup> Elizabeth Markovits, *The Politics of Sincerity: Plato, Frank Speech, and Democratic Judgment* (University Park, PA: Penn State Press, 2008) 58. The period of potential liability was one year after the proposal or speech.

<sup>640</sup> Plato, *The Trial and Death of Socrates: Four Dialogues*, trans. Benjamin Jowett (New York: Dover, 1992) 21.

B.C.<sup>641</sup> Anaxagoras was reportedly the first of the early Greek philosophers to settle in Athens. Anaxagoras claimed, *inter alia*, that everything is in everything and that “of the small there is no smallest, but always smaller.” He also taught that Mind directs the cosmos.<sup>642</sup> Anaxagoras became a close friend and political adviser to Pericles.

In an effort to damage Pericles politically, the oligarchic party in Athens targeted Pericles’ advisers in political prosecutions. The oligarchs succeeded in ostracizing Damonides “as a dangerous intermeddler and a favorer of arbitrary power.” Damonides first suggested that Pericles institute payment to the *dikasts* to curry favor by making “gifts to the people from their own property.”<sup>643</sup>

Pericles’ enemies also targeted Anaxagoras, focusing on Anaxagoras’ denial that the sun and the moon were divine beings. Anaxagoras insisted instead that the moon was a stone and the sun was a piece of red-hot burning iron.<sup>644</sup> These claims threatened the foundation of the Greek religion and rendered Anaxagoras susceptible to prosecution by Pericles’ enemies for *asebeia* or impiety.

Successful *asebeia* prosecutions at this time, however, usually required the actual performance of irreligious deeds by the defendant, such as failing to participate in religious

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<sup>641</sup> Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 377.

<sup>642</sup> Patricia Curd, *Anaxagoras of Clazomenae: Fragments and Testimonia* (Toronto: U. Toronto P., 2007) 3. Anaxagoras was also the first to claim that the sun illuminates the moon, and that the sun is the source of generation of fruit in plants. *Id.* at 112, 126.

<sup>643</sup> Plutarch, “Pericles,” *Plutarch’s Lives of Illustrious Men*, trans. John Dryden, vol. 3 (Philadelphia: Coates, 1900) 237; Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 37; Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 382; Anthony J. Podlecki, *Perikles and his Circle* (New York: Routledge, 1998) 20. Plutarch confirms this view in Plutarch, “Pericles,” *Plutarch’s Lives of Illustrious Men*, trans. John Dryden, vol. 3 (Philadelphia: Coates, 1900) 242. The best date available for the ostracism is sometime in the 440s.

<sup>644</sup> Patricia Curd, *Anaxagoras of Clazomenae: Fragments and Testimonia* (Toronto: U. Toronto P., 2007) 3.

rituals or actively mocking them. Although Solon's *asebeia* statute did not technically require such proof, *dikasteries* refused to give guilty verdicts in the absence of irreligious action.<sup>645</sup> The oligarchs had no grounds for allegations of irreligious action against Anaxagoras. Furthermore, Solon's statute required prosecutors to pursue *asebeia* prosecutions as *graphe* actions before the *heliaea*. Prosecutors bringing meritless claims in *graphe* actions were subject to sanctions of 1,000 drachmas and partial loss of their civic privileges (*atimia*).<sup>646</sup>

Since the oligarchs could not prosecute Anaxagoras under the existing law, they changed the law. Diopeithes introduced a decree during the 430s designed for prosecuting Anaxagoras.<sup>647</sup> The decree of Diopeithes authorized the *eisangelia* prosecution for *asebeia* of anyone who did not conform to the religious practices of the city, believe in the gods, or who taught new doctrines about things in the sky.<sup>648</sup> The decree thus tracked Anaxagoras' teaching that the moon was a stone and the sun was a piece of red-hot burning iron.<sup>649</sup> Furthermore, the *eisangelia* prosecution authorized by the decree involved no penalty for malicious prosecution.<sup>650</sup>

The oligarchs brought an *eisangelia* prosecution against Anaxagoras under the decree of Diopeithes. Athens convicted Anaxagoras. Some accounts report that his penalty was death, but

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<sup>645</sup> Douglas MacDowell, *The Law in Classical Athens* (London: Thames and Hudson, 1978) 200.

<sup>646</sup> Douglas MacDowell, *The Law in Classical Athens* (London: Thames and Hudson, 1978) 58.

<sup>647</sup> Plutarch, "Pericles," *Plutarch's Lives of Illustrious Men*, trans. John Dryden, vol. 3 (Philadelphia: Coates, 1900) 264; Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 382; Douglas MacDowell, *The Law in Classical Athens* (London: Thames and Hudson, 1978) 200. Harold Mattingly places the date of Diopeithes' decree as 427 B.C. Harold B. Mattingly, *The Athenian Empire Restored: Epigraphic and Historical Studies* (Ann Arbor: U. Mich. P., 1996) 526-27.

<sup>648</sup> Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 382; Douglas MacDowell, *The Law in Classical Athens* (London: Thames and Hudson, 1978) 200.

<sup>649</sup> Patricia Curd, *Anaxagoras of Clazomenae: Fragments and Testimonia* (Toronto: U. Toronto P., 2007) 3.

<sup>650</sup> Douglas MacDowell, *The Law in Classical Athens* (London: Thames and Hudson, 1978) 58.



others report that his penalty was only exile.<sup>651</sup> Diopeithes' decree represents the criminalization of philosophical thought and expression, not irreligious action.

Two of the charges that most concerned Socrates, that Socrates “searches into things under the earth and in heaven,” and that Socrates “teaches the aforesaid doctrines to others,” clearly echo the charges from the prosecution of Anaxagoras. Socrates expressly confirms this in the *Apology* by stating that Meletus thinks he is accusing Anaxagoras.<sup>652</sup>

### 3. The Trial of Protagoras (*circa* 415 B.C.)

The third charge, that Socrates “makes the worse appear the better cause,” is a clear reference to the Sophist Protagoras.<sup>653</sup> The *asebeia* prosecution of Protagoras *circa* 415 B.C. closely parallels the prosecution of Anaxagoras fifteen years earlier. Protagoras was a close associate of Alcibiades,<sup>654</sup> and Alcibiades had recently returned to the political stage. Protagoras

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<sup>651</sup> Patricia Curd, *Anaxagoras of Clazomenae: Fragments and Testimonia* (Toronto: U. Toronto P., 2007) 79. Sotion claims in his *Succession of the Philosophers* that Cleon brought Anaxagoras to trial for impiety because he held that the sun was a fiery mass of red-hot metal. Although Pericles defended him, the *ekklesia* fined Anaxagoras five talents and exiled him. Satyrus says in his *Lives*, however, that Thucydides, a political opponent of Pericles, brought the prosecution. The charges included both impiety (*asebeia*) and holding Persian sympathies. Anaxagoras was condemned to death *in absentia* after Pericles helped him escape Athens. According to Hermippus' *Lives*, Anaxagoras was imprisoned awaiting execution. Pericles persuaded the guards to release Anaxagoras. Unable to bear the insult of his conviction, however, Anaxagoras committed suicide. Hieronymus' *Miscellanies* records that Pericles brought Anaxagoras to the court wasted and thin from disease, and Anaxagoras was acquitted from pity.

<sup>652</sup> Plato, *The Trial and Death of Socrates: Four Dialogues*, trans. Benjamin Jowett (New York: Dover, 1992) 28: “Friend Meletus, you think that you are accusing Anaxagoras; and you have but a bad opinion of the judges, if you fancy them ignorant to such a degree as not to know that these doctrines are found in the books of Anaxagoras the Clazomenian, who is full of them.”

<sup>653</sup> Aristotle's *Rhetoric* attributes the technique of “making the worse arguments seem the better” to Protagoras: “This sort of argument illustrates what is meant by *making the worse arguments seem the better*. Hence people were right in objecting to the training Protagoras undertook to give them. It was a fraud; the probability it handled was not genuine but spurious, and has a place in no art except Rhetoric and Eristic.” Aristotle, *Rhetoric*, ed. W.D. Ross, trans. W. Rhys Roberts (New York: Cosimo, 2010) 112 (emphasis added).

<sup>654</sup> Ugo Zilioli, *Protagoras and the Challenge of Relativism: Plato's Subtlest Enemy* (Aldershot, UK: Ashgate, 2007) 21.

probably came to Athens to assist Alcibiades in formulating his political strategy.<sup>655</sup> The prosecution of Protagoras was an effort to damage Alcibiades politically. It was probably coordinated with the fraudulent prosecution of Alcibiades for profaning the Eleusinian mysteries in 415 B.C.<sup>656</sup>

Alcibiades' enemies prosecuted Protagoras in an *eisangelia* proceeding under the decree of Diopeithes.<sup>657</sup> Diogenes Laertius reports that the prosecutors charged Protagoras with agnosticism arising from a public reading of Protagoras' "On the Gods."<sup>658</sup> "On the Gods" contains the following statement: "Concerning the Gods, I am not able to know to a certainty whether they exist or whether they do not. For there are many things which prevent one from knowing, especially the obscurity of the subject, and the shortness of the life of man."<sup>659</sup>

Protagoras' chief accuser was Pythodorus. The *ekklesia* banished Protagoras for his agnosticism.<sup>660</sup> A public crier ordered Athenians to bring their copies of Protagoras' "On the Gods" to the market place where officials burned them.<sup>661</sup>

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<sup>655</sup> Ugo Zilioli, *Protagoras and the Challenge of Relativism: Plato's Subtlest Enemy* (Aldershot, UK: Ashgate, 2007) 21.

<sup>656</sup> Ugo Zilioli, *Protagoras and the Challenge of Relativism: Plato's Subtlest Enemy* (Aldershot, UK: Ashgate, 2007) 21. Protagoras was in Athens by 421 B.C., and 415 B.C. is the most probable date of Anaxagoras' departure from Athens.

<sup>657</sup> Ugo Zilioli, *Protagoras and the Challenge of Relativism: Plato's Subtlest Enemy* (Aldershot, UK: Ashgate, 2007) 21; Douglas MacDowell, *The Law in Classical Athens* (London: Thames and Hudson, 1978) 201.

<sup>658</sup> Diogenes Laertius, "Life of Protagoras," *The Lives and Opinions of the Eminent Philosophers*, trans. C.D. Yonge (London, Bell, 1901) 397-99.

<sup>659</sup> Diogenes Laertius, "Life of Protagoras," *The Lives and Opinions of the Eminent Philosophers*, trans. C.D. Yonge (London, Bell, 1901) 398.

<sup>660</sup> Douglas MacDowell, *The Law in Classical Athens* (London: Thames and Hudson, 1978) 201: "Although our evidence does not make the legal procedure clear, and one cannot be quite sure that the trials were held at all, I regard it as probable that both Anaxagoras and Protagoras were prosecuted by *eisangelia* in accordance with the decree of Diopeithes."

<sup>661</sup> Diogenes Laertius, "Life of Protagoras," *The Lives and Opinions of the Eminent Philosophers*, trans. C.D. Yonge (London, Bell, 1901) 398.

#### 4. Lack of Due Process Protections

The second reason that justified Socrates' dread of his old accusers' charges was the lack of due process protections in Athens' trial procedures. The absence of these protections permitted the *dikasts*, *inter alia*, to convict Socrates on charges outside the indictment and for reasons outside the evidence.

American law requires, for example, that criminal statutes define the prohibited conduct and the potential penalties with clarity and specificity. The law must furthermore fix these definitions and penalties prior to the defendant's criminal conduct. Criminal convictions also require proof of *mens rea*, proof that the defendant intended to engage in the prohibited conduct and did so knowingly. No conviction will stand for any act unless the indictment specifically lists that act. The punishment must not be excessive, and appeal is automatic in all capital convictions.

Athenian law provided none of these due process protections. Douglas MacDowell reconstructs the *asebeia* statute as follows: "If anyone commits *asebeia*, let anyone who wishes submit a *graphe*."<sup>662</sup> The statute gives no definition for *asebeia*.<sup>663</sup> Second, the statute specifies no penalty.<sup>664</sup> Third, the *asebeia* statute contains no *mens rea* requirement for conviction.<sup>665</sup> Fourth, there was no appeal from any decision of the *heliaea*.

Even the heliastic oath taken by each dikast reflects the pervasiveness of undefined laws

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<sup>662</sup> Douglas MacDowell, *The Law in Classical Athens* (London: Thames and Hudson, 1978) 129. MacDowell reconstructs the *asebeia* statute using the Athenian *hybris* statute as a model. The *hybris* statute survives in a speech composed by Demosthenes for a *hybris* case. Demosthenes, "Against Meidias," *Legal Speeches of Democratic Athens: Sources for Athenian History*, trans. Andrew Wolpert and Konstantinos Kapparis (Indianapolis: Hackett, 2011) 79-136.

<sup>663</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 12. Solon failed to state his laws in "simple and explicit terms."

<sup>664</sup> Douglas MacDowell, *The Law in Classical Athens* (London: Thames and Hudson, 1978) 129, 199. Demosthenes preserves the law against *hybris*.

<sup>665</sup> Douglas MacDowell, *The Law in Classical Athens* (London: Thames and Hudson, 1978) 198-99.

in the *heliaea*. “I will cast my vote in consonance with the laws and with the decrees passed by the Assembly and by the Council, but, *if there is no law*, in consonance with my sense of what is most just, without favor or enmity. I will vote only on the matters raised in the charge, and I will listen impartially to the accusers and defenders alike.”<sup>666</sup>

Socrates realized that the *dikasts* would not restrict their deliberations to the charges listed in the indictment. They would not restrict their deliberations by any legal definition of *asebeia*. They would not restrict their judgment by any prescribed penalty. There would be no appeal from their initial judgment. These realizations, plus Athens' recent history of convicting philosophers, gave Socrates ample reason to dread the charges of his old accusers.

### 5. The Character and Corruption of the *Dikasteries*

The third reason that justified Socrates' dread of his old accusers' charges was the character of the *dikasts* in the *heliaea*. Thucydides notes the gullibility of the Athenian *dikast*, writing that the Athenians were always in fear and took everything suspiciously.<sup>667</sup> In Xenophon's account of Socrates' trial, Hermogenes remarks on the *dikasts*' reputation for unjust decisions. The *dikasts* *often* put innocent men to death. The *dikasts* also acquitted the guilty *equally often*, persuaded by flattering arguments or moved by pity.<sup>668</sup>

Pericles' politically motivated payments to the *dikasts* had a corrupting effect on the *heliaea*.<sup>669</sup> Socrates charges Pericles in Plato's *Gorgias* with corrupting the Athenian character

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<sup>666</sup> James A. Colaico, *Socrates against Athens: Philosophy on Trial* (New York: Routledge 2001) 125. Colaico reconstructs the heliastic oath from the work of Demosthenes. Socrates refers to the heliastic oath in Plato's *Apology*. Plato, *The Trial and Death of Socrates: Four Dialogues*, trans. Benjamin Jowett (New York: Dover, 1992) 35.

<sup>667</sup> Thucydides, *History of the Peloponnesian War*, trans. Rex Warner (New York: Penguin, 1972) 442-43.

<sup>668</sup> Xenophon, *Socrates' Defense, Conversations of Socrates*, trans. Hugh Tredennick and Robin Waterfield (London: Penguin, 1990) 41-42: “Don't you see that the Athenian courts have often been prevailed upon by argument to put innocent men to death, and equally have often acquitted the wrongdoers, either out of pity aroused by the speeches or because they've been flattered?”

<sup>669</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 37.

at large by instituting pay, making the citizens “idle, cowardly, talkative, and avaricious.”<sup>670</sup> Aristotle relates that contemporary critics charged Pericles with corrupting the character of the juries. After payment was instituted, “it was always the common people who put themselves forward for selection as jurors, rather than men of better position.”<sup>671</sup> “It was the citizen of the poorest class who was attracted by the pay, and it was he who sat enthroned in the courts.”<sup>672</sup>

Aristotle also blames the payment of *dikasts* for the problem of bribery to the Athenian courts. Bribery was unknown until Pericles introduced payment for *dikasts* and the poor, the elderly, and city-dwellers became disproportionately overrepresented in the volunteer pool.<sup>673</sup> The first instance of bribery involved Anytus.

Anytus, of course, was the chief accuser at Socrates’ trial in 399 B.C. The wealthy Anytus was the target of an *eisangelia* prosecution for the loss of Pylos by his command during the Peloponnesian War. Anytus obtained an acquittal by bribing the entire *dikastery*.<sup>674</sup> Socrates was certainly aware that Anytus could resort to bribery to secure a conviction in Socrates’ case as well.

The extent of the precautions employed by the *heliaea* to prevent bribery exposes the pervasiveness of the problem. One precaution was the use of large *dikasteries* in hopes that their size would render bribery economically impracticable. The usual size of the *dikasteries* was 501 for a *graphe* or “public” prosecution and 201 for a *dike* or “private” case. Important cases,

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<sup>670</sup> Plato, “Gorgias,” *Plato in Twelve Volumes*, trans. W. R. M. Lamb vol. 3 (Cambridge: Harvard UP, 1967) 515e.

<sup>671</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 36.

<sup>672</sup> Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 112.

<sup>673</sup> Adriaan Lanni, *Law and Justice in the Courts of Classical Athens* (Cambridge: Cambridge UP, 2006) 38.

<sup>674</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 36; Douglas M. MacDowell, *The Law in Classical Athens* (Ithaca, NY: Cornell UP, 1978) 173; Debra Nails, *The People of Plato* (Indianapolis: Hackett, 2002) 37.

however, required *dikasteries* as large as 6,001.<sup>675</sup> Odd numbers of *dikasts* prevented hung verdicts.

Another precaution against bribery was the heliastic oath taken by each *dikast*.<sup>676</sup> Although every *dikast* was required to take this oath, Athens did not require any litigants to take an oath before presenting their case. Furthermore, litigants were not subject to prosecution for perjury.<sup>677</sup>

## F. The Verdicts in Socrates' Trial

Although the exact number of *dikasts* in Socrates' trial is unknown, many scholars accept the typical *dikastery* of 501 utilized in *graphe* prosecutions as the size of the *dikastery* in Socrates' trial.<sup>678</sup> Accepting this number *arguendo*, the *heliaea* convicted Socrates by a vote of 280 to 221.<sup>679</sup> Athenian law permitted *dikasts* to vote for the execution of innocent defendants, and eighty *dikasts* who found Socrates innocent voted for his execution.<sup>680</sup>

After the conviction, each side presented its proposed punishment. Socrates' accusers proposed death. The three main sources for Socrates' apology vary regarding Socrates' counter

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<sup>675</sup> Robert J. Bonner, *Lawyers and Litigants in Ancient Athens* (New York: Benjamin Blom, 1969) 33. 6,000 jurors deliberated in 415 B.C. when Leogoras prosecuted Speusippos during the alarm over the mutilation of the *hermae* and the profanation of the Eleusinian mysteries (which also led to the prosecution of Alcibiades). Douglas MacDowell, *The Law in Classical Athens* (London: Thames and Hudson, 1978) 36.

<sup>676</sup> James A. Colaico, *Socrates against Athens: Philosophy on Trial* (New York: Routledge 2001) 125.

<sup>677</sup> Thomas C. Brickhouse and Nicolas D. Smith, *Socrates on Trial* (Princeton: Princeton UP, 1989) 42.

<sup>678</sup> Thomas C. Brickhouse and Nicolas D. Smith, *Socrates on Trial* (Princeton: Princeton UP, 1989) 26.

<sup>679</sup> Socrates states that if thirty votes had “gone over to the other side, I should have been acquitted.” Plato, “Apology,” *The Trial and Death of Socrates: Four Dialogues*, trans. Benjamin Jowett (New York: Dover, 1992) 36. Diogenes Laertius records the vote as 281 to 220. Diogenes Laertius, *The Lives and Opinions of the Eminent Philosophers*, trans. C.D. Yonge (London: Bell, 1901) 72. J.B. Bury records it as 225 to 276. Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 393.

<sup>680</sup> Diogenes Laertius, *The Lives and Opinions of the Eminent Philosophers*, trans. C.D. Yonge (London: Bell, 1901) 72. Diogenes is the sole source for this result. Although this result is widely accepted, Brickhouse and Smith are “deeply suspicious” of this report since there is no confirming source. Thomas C. Brickhouse and Nicolas D. Smith, *Socrates on Trial* (Princeton: Princeton UP, 1989) 230.

proposal. Plato's Socrates initially likened himself to a hero and stated that he deserved to receive free meals at the *Prytaneion*.<sup>681</sup> Athens bestowed such meals to honor citizens who performed special services for the state.<sup>682</sup> Socrates rejected any penalty that the *dikastery* might have deemed appropriate, and finally offered a fine of thirty *minae*. Many scholars contend this small fine incensed the judges.<sup>683</sup>

Xenophon's Socrates refused to offer any counter-penalty, claiming that any proposed penalty would constitute an admission of guilt. He also refused to let his friends offer one.<sup>684</sup> Diogenes' Socrates initially offered to pay a fine of twenty-five drachmas. He withdrew it, however, when the *dikastery* voiced its disapproval. "My real opinion," he stated, "is that as a return for what has been done by me, I deserve maintenance in the *Prytaneum* for the rest of my life."<sup>685</sup>

As often happened in Athenian history, Athens soon regretted its decision to execute Socrates and turned on his accusers.<sup>686</sup> According to Diogenes, Athens condemned Meletus to

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<sup>681</sup> Plato, "Apology," *The Trial and Death of Socrates: Four Dialogues*, trans. Benjamin Jowett (New York: Dover, 1992) 36-37.

<sup>682</sup> Stephen G. Miller, *The Prytaneion: Its Function and Architectural Form* (Berkeley: U. Cal. Press, 1978) 129.

<sup>683</sup> Plato, "Apology," *The Trial and Death of Socrates: Four Dialogues*, trans. Benjamin Jowett (New York: Dover, 1992) 38; Bury, J.B., S.A. Cook and F.E. Adcock, eds., *Athens: 478-401 B.C.*, vol. 5 of *The Cambridge Ancient History*, 14 vols. (Cambridge: Cambridge UP, 1964) 393-395. Scholars dispute whether this was actually a trivial sum. Brickhouse and Smith argue that it was a substantial amount, particularly in view of Xenophon's statement that Socrates' entire net worth was only five *minae*. One *mina* was enough to purchase a small herd of goats, or two oxen, or 120 gallons of wine, or thirty gallons of olive oil. Thomas C. Brickhouse and Nicolas D. Smith, *Socrates on Trial* (Princeton: Princeton UP, 1989) 225-30.

<sup>684</sup> Xenophon, "Socrates' Defense," *Conversations of Socrates* (London: Penguin, 1990) 46-47.

<sup>685</sup> Diogenes Laertius, *The Lives and Opinions of the Eminent Philosophers*, trans. C.D. Yonge (London: Bell, 1901) 72.

<sup>686</sup> See discussion of the accusers in the trial of the Arginusae generals in Donald Kagan, *The Peloponnesian War* (New York: Penguin, 2003) 466.

death and banished Anytus and Lycon.<sup>687</sup> Athens then honored Socrates with a bronze statue by Lysippus,<sup>688</sup> thus earning “the indelible reproach of decreeing to the same citizens the hemlock on one day and statues on the next.”<sup>689</sup>

#### **IV. Evaluation of the Athenian Legal System**

##### **A. The Athenian Legal System Satisfies Hart's Conditions for a Valid Legal System**

Athenian law lacked even primitive due process protections and gave the minority no protection from the tyranny of the majority. As demonstrated by the Athenian *ostrakismos* procedure, the Athenian legal system intentionally permitted the conviction and punishment of the innocent. As demonstrated by the punishment phase of Socrates' trial, *dikasts* could vote to execute a defendant despite finding the defendant innocent. Nevertheless, the Athenian legal system satisfied all of legal positivism's requirements for a valid legal system.

As explained in Chapter II, Hart utilizes the external<sup>690</sup> and internal points of view<sup>691</sup> to explain the two conditions required for the existence of a valid legal system. The first condition

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<sup>687</sup> Diogenes Laertius, *The Lives and Opinions of the Eminent Philosophers*, trans. C.D. Yonge (London: Bell, 1901) 73. Anytus had left Athens to travel to Heraclea. The people of Heraclea banished him on the day of his arrival. *Id.* According to one source, supporters of Socrates at Heraclea stoned Anytus to death for his role in Socrates' death. Xenophon, “Apology of Socrates to the Jury,” *The Shorter Socratic Writings: Apology of Socrates to the Jury, Oeconomicus, and Symposium*, trans. Robert C. Bartlett (Ithaca: Cornell UP, 1996) 17.

<sup>688</sup> Diogenes Laertius, *The Lives and Opinions of the Eminent Philosophers*, trans. C.D. Yonge (London: Bell, 1901) 73.

<sup>689</sup> Alexander Hamilton, John Jay, and James Madison, “Federalist No. 63,” *The Federalist Papers*, ed. Ernest O'Dell (Sundown, TX: CreateSpace, 2010) 289.

<sup>690</sup> The *external point of view* is the view of a person who feels no obligation that he “should” follow the law. H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 56. The external point of view is present in people engaging in mere “social habits” and “group habits.” H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 56, 57.

<sup>691</sup> The *internal point of view*, on the other hand, is the view of a person who feels obligated to follow the law. H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 56-57.



is that private citizens generally obey the primary rules of obligation.<sup>692</sup> It is sufficient that each member of the population obeys the primary rules “for his part only” and “from any motive whatsoever.” In Hart’s terminology, it is *sufficient* that *citizens* take an *external* point of view toward *primary* rules.<sup>693</sup> Since Athenian citizens generally obeyed the primary rules of obligation, the Athenian legal system satisfied Hart’s first condition for a valid legal system.

The second condition for the existence of a valid legal system under Hart’s positivism is that public officials adopt the rule of recognition as their “public standard of official behavior.”<sup>694</sup> Officials must feel themselves obligated to adopt and abide by the rule of recognition, and they must censure those public officials who fail to do so. In Hart’s terms, it is a minimum *necessary* condition that *officials* take the *internal* point of view toward *secondary* rules.<sup>695</sup> Since the *dikasts* and other legal officials adopted the rule of recognition, the Athenian legal system satisfied Hart’s second condition for legal validity.

## **B. The Insufficiency of Autonomy and Consent for Legal Validity**

Since legal validity determines the enforceability of law, the standard for legal validity represents the most fundamental issue for any legal system. As demonstrated in Chapter I, the experience of the English Revolution of 1603-1701 established the necessity of autonomy and

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<sup>692</sup> “[P]rimary rules are concerned with the actions that individuals must or must not do.” Examples of primary rules include torts and criminal laws. H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 91.

<sup>693</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 116. “There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand, those rules of behaviour which are valid according to the system’s ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials.”

<sup>694</sup> The rule of recognition provides “a rule for conclusive identification of the primary rules of obligation,” and it serves as Hart’s ultimate criterion for the validity of law. H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 94-95, 105. A rule is legally valid, and therefore enforceable, if it conforms to the requirements set forth in the rule of recognition. *Id.* at 103.

<sup>695</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 117.

consent in determining legal validity. The trial of Socrates, however, reveals that autonomy and consent by themselves are insufficient to provide an acceptable standard of legal validity.

Autonomy and consent suffer from two shortcomings. First, autonomy and consent do not sufficiently protect the minority in a democracy from the *tyranny of the majority*. The Athenian *ostrakismos* procedure, which permitted the exile and execution of any innocent individual by the popular will, illustrates the need for such protection.

Second, autonomy and consent do not sufficiently protect against the *conviction and execution of the innocent*. By themselves, the principles of autonomy and consent still permit a legal system to treat its subjects as means to an end, just as Athenian law permitted Athens to treat Socrates as the means to a political end.

The trial of Socrates provides a compelling illustration of the need for *procedural due process* to protect against the conviction of the innocent.<sup>696</sup> Procedural due process requires that defendants have the right to a trial by an impartial jury.<sup>697</sup> The court must submit every juror to pre-trial examination, and the court must exclude all jurors who cannot lay aside preconceived notions of guilt or innocence.<sup>698</sup> The court must draw the jury from a cross section of the community that is broadly representative of the community at large.<sup>699</sup> The jury verdict must be unanimous.<sup>700</sup>

The court must change the venue of the trial if inflammatory publicity has repeatedly occurred within the community.<sup>701</sup> The court must limit evidence to those facts tending to prove

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<sup>696</sup> *Johnson v. New Jersey*, 384 U.S. 719 (1966).

<sup>697</sup> U.S. CONST. amend. VI; *Duncan v. Louisiana*, 391 U.S. 145 (1968).

<sup>698</sup> *Irvin v. Dowd*, 366 U.S. 717 (1961).

<sup>699</sup> *Ballew v. Georgia*, 435 U.S. 223 (1978).

<sup>700</sup> *Apodaca v. Oregon*, 406 U.S. 404 (1972).

<sup>701</sup> *Rideau v. Louisiana*, 373 U.S. 723 (1963).

or disprove the specific charges against the defendant.<sup>702</sup> The court must exclude evidence if its prejudicial value outweighs its probity.<sup>703</sup>

Every defendant has the right to assistance of counsel.<sup>704</sup> The prosecution must prove every element of the crime beyond a reasonable doubt.<sup>705</sup> Criminal statutes must be definite and certain in order to be enforceable. Vague statutes are void.<sup>706</sup> Furthermore, the prosecution must show that the defendant possessed a *mens rea*, a specific intent to perform the prohibited acts.<sup>707</sup>

Lastly, procedural due process does not permit excessive punishment. The punishment must not be disproportionate to the crime.<sup>708</sup> The *graphe* prosecution of Socrates violated each of the foregoing requirements of procedural due process. Consequently, Socrates was condemned despite his innocence of the charges against him.

### **C. A Principle of Reason is Necessary for Legal Validity**

Socrates' trial demonstrates the need for a third principle, a principle of reason, to overcome the shortcomings of autonomy and consent. This principle, at a minimum, must (1) protect against the tyranny of the majority and (2) the conviction and execution of the innocent. The chapters that follow demonstrate additional requirements for the principle of reason.

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<sup>702</sup> FED. R. EVID. 401, 402.

<sup>703</sup> FED. R. EVID. 403.

<sup>704</sup> U.S. CONST. amend. VI.

<sup>705</sup> *In re Winship*, 397 U.S. 358 (1970).

<sup>706</sup> *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

<sup>707</sup> *Screws v. United States*, 325 U.S. 91 (1945).

<sup>708</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002).

## CHAPTER IV

### THE GALILEO AFFAIR

“The intention of the Holy Spirit is to teach us how one goes to heaven and not how heaven goes.”  
**Galileo's Letter to the Grand Duchess Christina, 1615.**

The heresy trial of Galileo in 1633 was the climax of a series of events that began in 1613 with the publication of Galileo's *Sunspot Letters*. Historians refer to these events collectively as the Galileo Affair. In addition to the 1633 trial, the Galileo Affair included denunciations of Galileo in 1615 and 1624 before the Congregation of the Holy Office.<sup>709</sup>

The Galileo Affair exemplifies the need for validity restraints on legal systems to ensure they treat their subjects as ends in themselves. Like the trial of Socrates, the Galileo Affair reveals that autonomy and consent, although necessary, are insufficient by themselves to provide an acceptable standard of legal validity. A principle of reason incorporating *procedural due process* is also required to protect against the conviction and punishment of innocent parties.

Pope Paul III created the Congregation of the Holy Office in 1542 for the purpose of defending and upholding Catholic faith and morals, including the suppression of heresy and heretics previously handled by the Medieval Inquisition.<sup>710</sup> After 1542, the Congregation of the Holy Office and the Inquisition became practically synonymous. The experience of the Holy Office demonstrates that even a legal system subscribing to the noble intention of saving immortal souls will embrace torture and terror if unrestrained by the principles of reason, autonomy, and consent.

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<sup>709</sup> A “Congregation” is a committee of cardinals charged with conducting a department of church business. Maurice Finocchiaro, “Introduction,” *The Galileo Affair: A Documentary History* (Berkeley: U of Cal P, 1989) 14.

<sup>710</sup> The Second Vatican Council changed the name of the Congregation of the Holy Office to the Congregation for the Doctrine of the Faith in 1965. Maurice Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U of Cal P, 1989) 14.

In 1616, as Cardinal Maffeo Barberini, Pope Urban VIII had been Galileo's greatest protector from charges of heresy before the Holy Office. In 1633, however, Pope Urban VIII initiated and managed the prosecution of Galileo as a political stratagem to preserve his papacy. The Habsburgs sought to replace Urban VIII as Pope after reversals in the Thirty Years War, publicly charging that Urban VIII was tolerant of heretics.<sup>711</sup> Urban targeted Galileo to disprove this charge.

The Holy Office based Galileo's 1633 heresy prosecution on Galileo's violation of a putative 1616 injunction from the Holy Office. This unsigned, unwitnessed, and unnotarized document ordered Galileo to “abandon completely the above-mentioned opinion that the sun is the center of the world and the earth moves, nor henceforth hold, teach, or defend in any way whatever, orally or in writing; otherwise the Holy Office would start proceedings against him.” The document also recited that Galileo promised to obey its terms.<sup>712</sup>

The Holy Office charged that Galileo's 1632 *Dialogue on the Two Chief World Systems, Ptolemaic and Copernican* violated the 1616 injunction. As demonstrated below, however, the evidence in the Holy Office's own records compels the conclusion that the 1616 injunction was a subterfuge designed to obtain Galileo's conviction and abjuration for political ends. Galileo was

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<sup>711</sup> Mario Biagioli, *Galileo Courtier: The Practice of Science in the Culture of Absolutism* (Chicago: U of Chicago P, 1994) 335. Habsburg clients also charged that Urban was secretly in league with the Protestants. Some claimed that Urban VIII was a secret Protestant himself, and threatened to have him deposed by convening a General Council. David Marshall Miller, “The Thirty Years’ War and the Galileo Affair,” *History of Science* 46 (1) (2008): 49-74, 72 n. 96. The Habsburgs leveled heresy charges after Urban VIII rejected Habsburg demands that he utilize such “spiritual arms” as excommunication and interdict against the Protestant heretics and their allies, including France. Pope Urban VIII refrained from taking these steps because Cardinal Richelieu had threatened that France would break with the Roman Church if the Pope proceeded against France. David Marshall Miller, “The Thirty Years’ War and the Galileo Affair,” *History of Science* 46 (1) (2008): 49-74, 61.

<sup>712</sup> February 26, 1616, Special Injunction of the Father Commissary of the Holy Office to Galileo, published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 147-48.

thus condemned for violating an injunction *that he never received*. Nevertheless, the procedures and actions of the Holy Office satisfied all of legal positivism's requirements for legal validity.

## **I. Legal Proceedings before the Congregation of the Holy Office**

### **A. Legal Definitions of Heresy**

Galileo's condemnation states that Galileo rendered himself "vehemently suspected of heresy" for adopting the "formally heretical" view that "the sun is the center of the world and motionless."<sup>713</sup> The Holy Office recognized two categories of heresy, "formal heresy" and "suspicion of heresy." The Holy Office defined "formal heresy" as acts involving teaching, preaching, or writing matters against the articles of the Holy Faith, the decrees of the Sacred Councils, the determinations made by the Supreme Pontiffs, or the Holy Scriptures as interpreted by the Roman Catholic Church. Formal heretics included those who rejected the Holy Faith and followed or praised Islam, Judaism, or other sects. Formal heresy, in contrast to suspicion of heresy, involved a *mens rea*. The formal heretic committed heretical acts from evil intentions.<sup>714</sup>

"Suspicion of heresy" was a lesser offense than formal heresy. The Holy Office defined suspicion of heresy as possessing, reading, writing, or distributing books forbidden in the Index or by other decrees.<sup>715</sup> Suspicion of heresy also included "occasionally uttering propositions that offend the listeners," bigamy, taking holy orders when married, or listening to sermons by

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<sup>713</sup> June 22, 1663 Sentence published in Maurice Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U of Cal P, 1989) 287-91, 288, 291.

<sup>714</sup> Eliseo Masini, *Sacro Arsenale Pvero Prattica Dell'ufficio Della Santa Inquisizione* (Genoa: Appresso Giuseppe Pavoni, 1621); Maurice Finocchiaro, "Introduction," *The Galileo Affair: A Documentary History* (Berkeley: U of Cal P, 1989) 14.

<sup>715</sup> Intellectual activities in Catholic Europe were subject to the jurisdiction of two agencies of the Church, the Congregation of the Holy Office and the Congregation of the Index. Pope Pius V created The Congregation of the Index in 1571 for the purpose of book censorship. One of its main responsibilities was the compilation of a list of forbidden books called the *index librorum prohibitorum*. Maurice Finocchiaro, "Introduction," *The Galileo Affair: A Documentary History* (Berkeley: U of Cal P, 1989) 14.

heretics, even on a single occasion. Depending on the gravity of the offense, the Holy Office categorized suspicion of heresy as either “vehement” or “slight.”<sup>716</sup>

## **B. Initiation of Proceedings**

The Holy Office recognized two procedures for initiating legal proceedings. The first procedure involved the filing of a third party complaint with the Holy Office. The complaining party in such cases was required to make a declaration of the purity of his motivation and to give a deposition before the Holy Office. The second procedure permitted the initiation of a proceeding at the discretion of an inquisitor acting on publicly available knowledge or publicly expressed opinion.<sup>717</sup>

## **C. Procedure before the Holy Office**

Proceedings before the Holy Office bore little resemblance to modern trials. The inquisitors did not bear the burden of proving that the defendant had actually committed a heretical offense or performed any particular act. Instead, the prosecution sought to establish heretical *tendencies*.<sup>718</sup>

The U.S. Constitution prohibits compelling defendants to give evidence against themselves.<sup>719</sup> Beginning in 1140, canon law expressly prohibited the use of coerced confessions

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<sup>716</sup> Eliseo Masini, *Sacro Arsenale Pvero Prattica Dell'ufficio Della Santa Inquisizione* (Genoa: Appresso Giuseppe Pavoni, 1621); Maurice Finocchiaro, “Introduction,” *The Galileo Affair: A Documentary History* (Berkeley: U of Cal P, 1989) 14.

<sup>717</sup> Eliseo Masini, *Sacro Arsenale Pvero Prattica Dell'ufficio Della Santa Inquisizione* (Genoa: Appresso Giuseppe Pavoni, 1621); Maurice Finocchiaro, “Introduction,” *The Galileo Affair: A Documentary History* (Berkeley: U of Cal P, 1989) 15.

<sup>718</sup> Wade Rowland, *Galileo's Mistake: A New Look At the Epic Confrontation between Galileo and the Church* (New York: Arcade, 2003) 242.

<sup>719</sup> U.S. CONST. amend. V: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

as well.<sup>720</sup> Nevertheless, the Holy Office considered confessions, even if obtained by torture, to be the purest and most reliable evidence.<sup>721</sup> The express goal of all proceedings before the Holy Office was to obtain the confession of the accused by any necessary means.<sup>722</sup>

The Holy Office justified coerced confessions on two grounds. First, the Holy Office maintained that the ultimate goal of the inquisition was the reclamation of an errant soul, not the punishment of errant actions, and confessions were essential to reclaiming the soul.<sup>723</sup> The Church viewed the inquisitor as an impartial spiritual father whose efforts to reclaim souls must be unimpeded by legal safeguards.<sup>724</sup> Second, the inquisitors sought to establish a heretical

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<sup>720</sup> Edward Peters, *Torture* (Philadelphia: U Penn Press, 1996) 52-53. Gratian's *Decretum*, circa 1140, was one of six legal texts comprising the *Corpus Juris Canonici*. The *Corpus Juris Canonici* contained the Church's canon law. It had binding effect until Pope Benedict XV replaced it with a revised version on May 27, 1918. Gratian's *Decretum* forbids clerics from employing torture (*Decretum* D.86 c.25), forbids coerced confessions, and requires that all confessions utilized in ecclesiastical proceedings be spontaneous (*Decretum* C.15 p.6 d.1). The acceptance of torture in proceedings before the Inquisition developed soon after the Fourth Lateran Council prohibited the participation of clerics in ordeals in 1215. To overcome the conflict between the canon law's prohibition against torture and coercing confessions on one hand, and Pope Innocent IV's 1252 bull permitting these practices on the other, Innocent IV's successor Pope Alexander IV authorized inquisitors in 1256 to grant each other mutual dispensations and absolve each other for violations of these provisions of canon law. Henry Charles Lea, *The Inquisition of the Middle Ages: Its Organization and Operation* (New York: Citadel, 1954) 118.

<sup>721</sup> Wade Rowland, *Galileo's Mistake: A New Look At the Epic Confrontation between Galileo and the Church* (New York: Arcade, 2003) 243.

<sup>722</sup> Henry Charles Lea, *The Inquisition of the Middle Ages: Its Organization and Operation* (New York: Citadel, 1954) 106: "Confession of heresy thus became a matter of vital importance, and no effort was deemed too great, no means too repulsive, to secure it. This became the center of the inquisitorial process, and it is deserving of detailed consideration, not only because it formed the basis of procedure in the Congregation of the Holy Office, but also because of the vast and deplorable influence which it exercised for five centuries on the whole judicial system of Continental Europe."

<sup>723</sup> Richard J. Blackwell, *Behind the Scenes at Galileo's Trial: Including the First English Translation of Melchior Inchofer's Tractatus syllepticus* (Notre Dame, IN: U of Notre Dame P, 2006) 7. In Galileo's sentence, for example, Galileo was "absolved from his deficiencies" if he accepted the judgment.

<sup>724</sup> Henry Charles Lea, *The Inquisition of the Middle Ages: Its Organization and Operation* (New York: Citadel, 1954) 101: "All the safeguards which human experience had shown to be necessary in judicial proceedings of the most trivial character were deliberately cast aside in these cases, where life and reputation and property through three generations were involved. Every doubtful point was decided 'in favor of the faith.'"



tendency based on the secret thoughts and opinions of the accused.<sup>725</sup> Since heretical tendencies involved mental processes, they often were not susceptible to material proof.<sup>726</sup>

The Holy Office gave itself every procedural and psychological advantage in extracting the confession. The Holy Office prejudged the accused as guilty before arresting him, and the prosecuting inquisitors served as the final judges in the cases they chose to prosecute. There was no presumption of innocence. Instead, the Holy Office presumed every suspect to be guilty.<sup>727</sup> In cases of “vehement suspicion,” such as Galileo’s, there was not even a requirement of *any* evidence. By legal fiction, the “vehement suspicion” itself satisfied all evidentiary requirements.<sup>728</sup>

The first demand made upon the accused in his trial was an oath that he would obey all the demands of the Church, answer all questions asked of him, betray all heretics known to him, and perform any penance imposed upon him. Refusal to take this oath constituted an admission of contumacious heresy.<sup>729</sup> The Holy Office denied the accused any right to counsel, and any person that defended an accused heretic exposed himself to similar charges of heresy.<sup>730</sup> The

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<sup>725</sup> Henry Charles Lea, *The Inquisition of the Middle Ages: Its Organization and Operation* (New York: Citadel, 1954) 96.

<sup>726</sup> Wade Rowland, *Galileo’s Mistake: A New Look At the Epic Confrontation between Galileo and the Church* (New York: Arcade, 2003) 242.

<sup>727</sup> Wade Rowland, *Galileo’s Mistake: A New Look At the Epic Confrontation between Galileo and the Church* (New York: Arcade, 2003) 242-43. Henry Charles Lea, *The Inquisition of the Middle Ages: Its Organization and Operation* (New York: Citadel, 1954) 101, 103.

<sup>728</sup> Henry Charles Lea, *The Inquisition of the Middle Ages: Its Organization and Operation* (New York: Citadel, 1954) 243. Pope Alexander IV announced and reiterated this policy in the bull *Quod super nonnullis* dated December 9, 1257, December 15, 1258, and January 10, 1260. Pope Urban IV reiterated the policy on August 21, 1262.

<sup>729</sup> Henry Charles Lea, *The Inquisition of the Middle Ages: Its Organization and Operation* (New York: Citadel, 1954) 95.

<sup>730</sup> Henry Charles Lea, *The Inquisition of the Middle Ages: Its Organization and Operation* (New York: Citadel, 1954) 231. The Inquisition held that the object of the Inquisition was to destroy heresy. The destruction of heresy required the destruction of its defenders and abettors as well. This required either their conversion to the true Catholic faith or the burning of their bodies.

Holy Office cloaked every aspect of the trial in secrecy, justifying the secret conduct of trials as necessary to prevent the further dissemination of heresy.<sup>731</sup> Members of the Holy Office faced severe punishment for speaking or writing about past or present cases.<sup>732</sup>

The Holy Office also concealed the accusers' identities, thus depriving the accused of any opportunity to confront his accusers. The Holy Office concealed the evidence supporting those charges and the identity of the witnesses against him. This denied the accused any opportunity to challenge the evidence against him or cross-examine adverse witnesses.<sup>733</sup> The Holy Office did not even inform defendants of the charges against them.<sup>734</sup>

Inquisitions before the Holy Office could be a protracted affair, and there were no time limits on duration of the proceedings.<sup>735</sup> The Holy Office permitted no bail, imprisoning the accused for the entire duration of the trial, often under harsh conditions.<sup>736</sup> Restricted diet reduced the body and weakened the will, rendering the prisoner less able to resist alternate threats of death and promises of mercy.<sup>737</sup>

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<sup>731</sup> Wade Rowland, *Galileo's Mistake: A New Look at the Epic Confrontation between Galileo and the Church* (New York: Arcade, 2003) 242-43; Henry Charles Lea, *The Inquisition of the Middle Ages: Its Organization and Operation* (New York: Citadel, 1954) 102.

<sup>732</sup> Richard J. Blackwell, *Behind the Scenes at Galileo's Trial: Including the First English Translation of Melchior Inchofer's Tractatus syllepticus* (Notre Dame, IN: U of Notre Dame P, 2006) 7.

<sup>733</sup> Wade Rowland, *Galileo's Mistake: A New Look at the Epic Confrontation between Galileo and the Church* (New York: Arcade, 2003) 242-43.

<sup>734</sup> The third question asked Galileo in his trial was whether he knew or could guess the reason why the Holy Office had summoned him to Rome. April 12, 1633, Deposition of Galileo published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 256-62, 256.

<sup>735</sup> Wade Rowland, *Galileo's Mistake: A New Look at the Epic Confrontation between Galileo and the Church* (New York: Arcade, 2003) 242-43. Galileo's trial began on April 12, 1633 and continued until June 22, 1633. Maurice Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U of Cal P, 1989) 8.

<sup>736</sup> Richard J. Blackwell, *Behind the Scenes at Galileo's Trial: Including the First English Translation of Melchior Inchofer's Tractatus syllepticus* (Notre Dame, IN: U of Notre Dame P, 2006) 7; Henry Charles Lea, *The Inquisition of the Middle Ages: Its Organization and Operation* (New York: Citadel, 1954) 103, 116.

<sup>737</sup> Henry Charles Lea, *The Inquisition of the Middle Ages: Its Organization and Operation* (New York: Citadel, 1954) 116-17.

If these measures failed to secure a confession, or if the inquisitors lacked sufficient evidence to support their suspicions, the inquisitors had discretion to torture the accused to extract his confession.<sup>738</sup> In Galileo's case, the Pope expressly directed the Holy Office to conduct Galileo's interrogation under a formal threat of torture.<sup>739</sup> This routine utilization of torture to obtain confessions was anomalous, as canon law since the twelfth century prohibited any use of torture by clerics as well as the coercion of confessions in ecclesiastical proceedings.<sup>740</sup>

The express purpose of torture, as stated in Eliseo Masini's 1621 inquisition manual, was "to make up for the shortcomings of witnesses, when they cannot adduce a conclusive proof against the culprit."<sup>741</sup> Although each accused was only subject to being tortured once,

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<sup>738</sup> Eliseo Masini, *Sacro Arsenale Pvero Prattica Dell'ufficio Della Santa Inquisizione* (Genoa: Appresso Giuseppe Pavoni, 1621); Maurice Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U of Cal P, 1989) 14; Henry Charles Lea, *The Inquisition of the Middle Ages: Its Organization and Operation* (New York: Citadel, 1954) 117-18. Innocent IV authorized the use of torture in heresy proceedings in his 1252 bull *Ad extirpanda*, and this authorization continued until the Vatican banned the use of torture in 1819. Prior to Innocent IV's bull, the Church had consistently opposed the use of torture and Gratian wrote that canon law prohibited the use of torture to extract confessions.

<sup>739</sup> Maurice Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U of Cal P, 1989) 38, 287, 363 n. 85. The Pope issued the order on June 16, 1633, and the Inquisition carried out the Pope's order on June 21, 1633, as recorded in Galileo's Fourth Deposition. Maurice Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U of Cal P, 1989) 287.

<sup>740</sup> Edward Peters, *Torture* (Philadelphia: U Penn Press, 1996) 52-53. Gratian's *Decretum* forbids clerics from employing torture (*Decretum* D.86 c.25), forbids coerced confessions, and requires that all confessions utilized in ecclesiastical proceedings be spontaneous (*Decretum* C.15 p.6 d.1). Gratian recognizes three exceptions to the prohibition against torture: (1) clerics may torture the accusers of a bishop (*Decretum* C.5 q.5 c.4); (2) clerics may torture members of the lower classes (*Decretum* C.4 qq. 2-3); and (3) clerics may torture slaves (*Decretum* C.12 q.2 c.59). Henry Lea writes: "The rack and strappado [torture in which the victim's hands are first tied behind their back and the victim is then suspended in the air by means of a rope attached to wrists], in fact, were in such violent antagonism, not only with the principles of Christianity, but with the practices of the Church, that their use by the Inquisition, as a means of furthering the faith, is one of the saddest anomalies of that dismal period. I have elsewhere shown how consistently the Church opposed the use of torture, so that, in the barbarism of the twelve century, Gratian lays it down as an accepted rule of the canon law that no confession is to be extorted by torment." Henry Charles Lea, *The Inquisition of the Middle Ages: Its Organization and Operation* (New York: Citadel, 1954) 117.

<sup>741</sup> Eliseo Masini, *Sacro Arsenale Pvero Prattica Dell'ufficio Della Santa Inquisizione* (Genoa: Appresso Giuseppe Pavoni, 1621) 120. Eliseo Masini was the inquisitor of Genoa in 1621. *Accord*, Maurice Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U of Cal P, 1989) 363.

inquisitors sidestepped this limitation by characterizing subsequent torture sessions as continuations of the original session.<sup>742</sup> If the accused confessed under torture but later retracted the confession, the law presumed that the confession was true and that the retraction was perjury. The retraction proved that the accused was an impenitent heretic, and the inquisitors remanded the accused to the secular authorities for execution at the stake without further hearing.<sup>743</sup>

The threat of punishment was an additional tool for obtaining confessions. Punishments ranged in severity from “minor penalties of humiliation” to public burning at the stake.<sup>744</sup> At the end of the trial, the inquisitors read the assessment of penalties and the accused received a final opportunity to confess his heresy. If the accused confessed, the inquisitors announced the accused reconciled to the Church and carried out his punishment.<sup>745</sup> If he refused, however, he was “handed over to the civil arm” to be publicly burned alive. The civil authorities conducted all executions lest there be any blood upon the Holy Office.<sup>746</sup>

The inquisitorial procedure lacked even minimal safeguards to protect the accused innocent from false conviction. As English jurist Sir John Fortescue observed, the inquisitorial

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<sup>742</sup> Wade Rowland, *Galileo's Mistake: A New Look At the Epic Confrontation between Galileo and the Church* (New York: Arcade, 2003) 243; Henry Charles Lea, *The Inquisition of the Middle Ages: Its Organization and Operation* (New York: Citadel, 1954) 123.

<sup>743</sup> Henry Charles Lea, *The Inquisition of the Middle Ages: Its Organization and Operation* (New York: Citadel, 1954) 124-25.

<sup>744</sup> Wade Rowland, *Galileo's Mistake: A New Look At the Epic Confrontation between Galileo and the Church* (New York: Arcade, 2003) 244. The Congregation of the Holy Office solemnly pronounced its penalties on a Sunday in a church or other public place. These penalties ranged in severity from penances, fasting, prayers, and pilgrimages to public scourging and the compulsory wearing of a yellow felt cross sewn onto the clothing. Prior to their public humiliation, the convicted heretics marched in a procession carrying a bundle of wood on their shoulder. The wood denoted that any relapse into heresy would result in their execution at the stake. Imprisonment could extend for any duration, including life, and could range from house arrest under mild conditions to the *muris strictus*, which consisted of “being placed in the deepest dungeon in single or double fetters and fed only bread and water.”

<sup>745</sup> Wade Rowland, *Galileo's Mistake: A New Look At the Epic Confrontation between Galileo and the Church* (New York: Arcade, 2003) 244.

<sup>746</sup> Richard J. Blackwell, *Behind the Scenes at Galileo's Trial: Including the First English Translation of Melchior Inchofer's Tractatus syllepticus* (Notre Dame, IN: U of Notre Dame P, 2006) 8.

procedure placed every man's life and liberty at the mercy of any enemy who could suborn two unknown witnesses to swear against the accused.<sup>747</sup> No accused could escape the Holy Office if his inquisitors vehemently suspected heresy or otherwise desired his condemnation.

## II. Prelude to Galileo's First Inquisition

### A. *The Starry Messenger* (1610)

Galileo achieved fame in 1610 by publishing his discovery of mountains on the moon and moons orbiting Jupiter in *Siderius Nuncius* (*Starry Messenger*). Galileo skillfully translated his scientific fame into political patronage, first by presenting his telescope to the Venetian Senate, then by naming Jupiter's moons the Mediciean Stars after the ruling family of Tuscany. The Medici rewarded Galileo with a position in the Florentine court and a sinecure at the University of Pisa.<sup>748</sup> Since the dukedom of Tuscany kept close ties to the Vatican, entry into the Tuscan court afforded Galileo access to social, political, and religious influence. Galileo quickly capitalized on his entry into the Roman orbit.<sup>749</sup>

Galileo traveled to Rome in 1611. The Jesuits of the Collegio Romano lauded Galileo and elected him to the exclusive Accademia dei Lincei.<sup>750</sup> Membership in the Accademia

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<sup>747</sup> Sir John Fortescue, "In Praise of the Laws of England," *On the Laws and Governance of England*, ed. Shelley Lockwood (Cambridge: Cambridge UP, 1997) 41: "Indeed that man cannot be safe in body or goods, whom his enemy can in every cause conflict by two, even unknown witnesses, chosen and brought forward by him. And even if he is not condemned to death by their evidence, yet he who escapes death is not much better off, considering the contraction of his sinews and limbs, and the chronic weakness of his body. Indeed, the cunning of an enemy can pursue with such danger a man who lives under the law which you have just described." Fortescue (c.1394 - c.1480) was a renowned English judge and chancellor to Henry VI. Fortescue gives the first statement of "Blackstone's Theorem" in his argument against using torture in judicial proceedings: "I should, indeed, prefer twenty guilty men to escape death through mercy, than one innocent to be condemned unjustly." *Id.*

<sup>748</sup> Mario Biagioli, "Galileo the Emblem Maker," *Isis* 81 (2) (1990) 230-58, 232; Mario Biagioli, *Galileo's Instruments of Credit: Telescopes, Images, Secrecy*, (Chicago: U of Chi. P, 2006) 128-29.

<sup>749</sup> David Marshall Miller, "The Thirty Years' War and the Galileo Affair," *History of Science* 46 (1) (2008): 49-74, 52.

<sup>750</sup> The name means literally "academy of the lynx-eyed." Frederico Cesi selected the name for the symbolism of the lynx's acute powers of observation, which symbolized the requirements for success in science. The name "Lincei" (lynx) was inspired by Giambattista della Porta's book *Magia Naturalis* which

brought Galileo into contact with many of Rome's liberal *literati*.<sup>751</sup> Galileo was proud of his membership and thereafter added the terms “Lyncaeus” or “Linco” to his signature and to the title pages of his publications.<sup>752</sup> Galileo's growing reputation, however, had already attracted the attention of the Congregation of the Holy Office, which first investigated Galileo in 1611.<sup>753</sup>

### **B. *Letters on Sunspots* (1613)**

The Accademia dei Lincei published Galileo's *Letters on Sunspots* (*Istoria e Dimostrazioni intorno alle Macchie Solari*) in 1613. Galileo's *Letters on Sunspots* disagreed with the German Jesuit Christoph Scheiner's claim that sunspots were small planets, and Galileo correctly identified them instead as marks on the surface of the sun.<sup>754</sup> Galileo's *Letters on Sunspots* added to Galileo's renown, but Galileo's defense of Copernicanism in the *Letters on Sunspots* placed him at the center of a growing storm of controversy.

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bore an illustration of a lynx on the cover with the words “...with lynx like eyes, examining those things which manifest themselves, so that having observed them, he may zealously use them.” Thomas G. Bergin, ed., *Encyclopedia of the Renaissance* (Oxford: New Market Books, 1987) 2, 137. The academy's founder Frederico Cesi bestowed his personal motto on the academy: “*Minima cura si maxima vis*,” meaning “care of the least things produces the greatest results.”

<sup>751</sup> William R. Shea and Mariano Artigas, *Galileo in Rome: The Rise and Fall of a Troublesome Genius* (Oxford: Oxford UP, 2004) 30-44.

<sup>752</sup> David Freedberg, *The Eye of the Lynx: Galileo, His Friends, and the Beginnings of Modern Natural History* (Chicago: U Chi. P, 2002) 73.

<sup>753</sup> A former scribe, Silvestro Pagnoni, denounced Galileo to the Venetian Inquisition in 1604 for casting horoscopes and telling clients that the predictions were indubitable. Pagnoni tailored his accusations to match the condemnations of astrological determinism by the Council of Trent and the papal bull of 1586. A secret informer also denounced Cesare Cremonini, Galileo's friend and colleague at the University of Padua. The Venetian authorities dismissed the charges as the slanders of a mortal enemy. Some unauthorized person in Venice forwarded the charges to Rome, however, and the Roman Congregation of the Holy Office investigated Galileo in 1611 based on those charges. Michael H. Shank, “Setting the Stage: Galileo in Tuscany, the Veneto, and Rome,” *The Church and Galileo*, ed. Ernan McMullin (South Bend, IN: U Notre Dame P, 2005) 57-87, 66.

<sup>754</sup> Galileo wrote his *Letters on Sunspots* to the wealthy Augsburg Magistrate Mark Wesler, a well-known patron of the new sciences, in response to Christoph Scheiner's *Letters on Sunspots*, published through Wesler in 1612. Scheiner desired to save the perfection of the sun. Scheiner described sunspots as small intramercurial planets. Galileo correctly identified sunspots as markings on the solar surface. By studying the position of sunspots on successive days, Galileo inferred that the Sun rotates, and established its rotation period as close to one lunar month. Dan Hofstadter, *The Earth Moves: Galileo and the Inquisition* (New York: Norton, 2009) 90-92.

Although Copernicus published his great work *De revolutionibus orbium coelestium* seventy years earlier, the telescopic evidence supporting Copernicanism was new. The discovery of Jupiter's moons, sunspots, and the phases of Venus brought Copernican ideas of the earth's motion and the sun's rest to the public and gave Copernican ideas a new credibility among astronomers. This new evidence also rendered the Aristotelian model of the universe as a series of concentric spheres increasingly untenable.

Theologians sympathetic to the Aristotelian model sounded the alarm, summoning what Galileo termed the “terrible weapon” of scripture to their cause.<sup>755</sup> On December 14, 1613, Galileo received a disturbing letter from Benedetto Castelli, a Benedictine abbot and mathematician. Castelli was a former student of Galileo who succeeded Galileo at the University of Pisa. Castelli's letter explained that Castelli had encountered scriptural objections to Galileo's ideas at a meal in the Medici palace. Some of the objections came from the Dowager Grand Duchess of Tuscany, Christina of Lorraine.<sup>756</sup>

This was troubling news. If the scriptural arguments of the Aristotelians persuaded his Medici patrons, Galileo might have to choose between the science supporting Copernicanism and the benefits of the Medici's patronage. Galileo hastily drafted a response to Castelli's letter in which Galileo examines “some general questions about the use of holy Scripture in disputes involving physical conclusions.”<sup>757</sup> The Holy Office would later use this letter against Galileo.

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<sup>755</sup> Ernan McMullin, “Galileo's Theological Venture,” *The Church and Galileo*, ed. Ernan McMullin (South Bend, IN: U Notre Dame P, 2005) 88-116, 99.

<sup>756</sup> Castelli's letter appears in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 47-48. Cosimo Boscaglia, a professor of philosophy at the University of Pisa, inspired the Grand Duchess' questions.

<sup>757</sup> Galileo's response appears in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 49-54.

### C. Galileo's Letter to Castelli (December 21, 1613)

Galileo's letter to Castelli argues for the priority of sensory experience and experimentation over scripture in describing natural phenomena. Galileo's approach to scripture utilizes, and sometimes exaggerates, exegetical principles implicit in Augustine's commentary on Genesis, *De Genesi ad litteram*, as well Augustine's *City of God*.<sup>758</sup> Galileo writes to Castelli that Scriptures have to “accommodate the incapacity of ordinary people.” Readers should not interpret all passages of Scripture literally, such as those that attribute hands and eyes to God. It thus follows that “in disputes about natural phenomena, [scripture] should be reserved to the last-place.”

Although scripture and nature both derive from God, scripture is necessarily open to multiple interpretations. Nature, on the other hand, “is inexorable and immutable” and is in no way bound to accommodate human understanding. Therefore, “whatever sensory experience places before our eyes or necessary demonstrations prove to us concerning natural effects should not be called into question on account of Scriptural passages whose words appear to have a

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<sup>758</sup> Ernan McMullin, “Galileo's Theological Venture,” *The Church and Galileo*, ed. Ernan McMullin (South Bend, IN: U Notre Dame P, 2005) 88-116, 99. Augustine's *De Genesi ad litteram* (“the literal meaning of Genesis”) took fourteen years to complete, from 401-415 A.D. Augustine returned to this topic in his *City of God* (circa 422-429 A.D.). McMullin formulates seven exegetical principles from Augustine's *De Genesi ad litteram* and *City of God* as follows at pages 90-97. *The Principle of Consistency* provides that the proper meaning of scripture cannot be in true conflict with the findings of human sense or reason. *The Principle of Priority of Demonstration* provides that when there is a conflict between a proven truth about the physical world and a particular reading of scripture, then one should seek an alternative reading of scripture. *The Principle of Priority of Faith* provides that one must give doctrines of the faith over principles demonstrated by philosophy. *The Principle of Accommodation* provides that the choice of language in scripture necessarily accommodates the capacities of the intended audience. *The Principle of Scriptural Limitation* provides that since the primary concern of scripture is human salvation, we should not look to Scripture for knowledge of the natural world. *The Principle of Priority of Scripture* provides that where there is an apparent conflict between scripture and an assertion about the natural world grounded on sense or reason, if the assertion grounded on sense or reason falls short of proof, then one should take the scriptural passage in its normal literal sense to convey natural knowledge. Lastly, *The Principle of Prudence* provides that when trying to discern the meaning of a difficult scriptural passage, one should keep in mind that different interpretations of the text might be possible. Consequently, one should not rush into premature commitment to one of these interpretations, especially since further progress in the search for truth may later undermine this interpretation.



different meaning, since not every statement of the Scripture is bound to obligations as severely as is each effect of nature.”<sup>759</sup>

It is obvious, Galileo continues, that two truths can never contradict one another. Therefore, “the task of wise interpreters is to strive to find the true meanings of Scriptural passages that would agree with those physical conclusions of which we are already certain and sure from clear sensory experience or from necessary demonstrations.” Even though scripture is inspired, Galileo argues, its interpreters are not.<sup>760</sup>

Galileo next argues that the scriptures are limited to doctrines that bear on human salvation. Natural science lies outside their scope. “The authority of Holy Writ has merely the aim of persuading men of those articles and propositions which are necessary for their salvation and surpass all human reason, and so could not become credible through some other science or any other means except the mouth of the Holy Spirit itself.”<sup>761</sup> Where knowledge of nature is concerned, “the one who supports the true side will be able to provide a thousand experiments and a thousand necessary demonstrations for his side, whereas the other person can have nothing but sophisms, paralogisms, and fallacies.”

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<sup>759</sup> Ernan McMullin, “Galileo’s Theological Venture,” *The Church and Galileo*, ed. Ernan McMullin (South Bend, IN: U Notre Dame P, 2005) 88-116, 100. McMullin notes that this argument by Galileo applies the *Principle of Priority of Demonstration* “in a stronger form than Augustine gave it.” *The Principle of Priority of Demonstration* provides that when there is a conflict between a proven truth about the physical world and a particular reading of scripture, then one should seek an alternative reading of scripture.

<sup>760</sup> Ernan McMullin, “Galileo’s Theological Venture,” *The Church and Galileo*, ed. Ernan McMullin (South Bend, IN: U Notre Dame P, 2005) 88-116, 100.

<sup>761</sup> Ernan McMullin, “Galileo’s Theological Venture,” *The Church and Galileo*, ed. Ernan McMullin (South Bend, IN: U Notre Dame P, 2005) 88-116, 101. McMullin notes that this argument by Galileo is the *Principle of Scriptural Limitation* “in its strongest form.” *The Principle of Scriptural Limitation* provides that since the primary concern of scripture is with human salvation, we should not look to Scripture for knowledge of the natural world. Galileo would summarize this argument as “the intention of the Holy Spirit is to teach us how one goes to heaven and not how heaven goes” in a letter to the Grand Duchess Christina. Galileo’s 1615 Letter to the Grand Duchess Christina published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 87-118, 96.

Galileo concludes by addressing the text in Joshua 10:13 regarding the sun's motion.<sup>762</sup> Aristotelians argued that a literal interpretation of that text was inconsistent with Copernicanism. Galileo demonstrates that a literal interpretation of the text, which states that *the sun stood still*, was instead consistent with Copernicanism and inconsistent with the Aristotelian model of the universe as a series of concentric spheres.<sup>763</sup>

### **III. Galileo's First Inquisition (February 7, 1615)**

#### **A. Friar Caccini Denounces Galileo (December 21, 1614)**

Dominican Friar Tommaso Caccini publicly denounced Galileo as a Copernican on December 21, 1614, at the Church of Santa Maria Novella in Florence.<sup>764</sup> Although Caccini's superior wrote a letter to Galileo on January 10, 1615, apologizing for Caccini's "excessive zeal,"<sup>765</sup> Caccini's fellow Dominican Niccolo Lorini filed a secret complaint against Galileo with the Congregation of the Holy Office on February 7, 1615.

Lorini attached a copy of Galileo's December 21, 1613, letter to Castelli in support of his allegations.<sup>766</sup> Lorini wrote that he was motivated to file his complaint by Caccini's sermon against Galileo.<sup>767</sup> Lorini requested that the Holy Office keep his complaint a secret.<sup>768</sup>

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<sup>762</sup> Joshua 10:13. "So the sun stood still, and the moon stopped, until the nation avenged themselves of their enemies. Is it not written in the book of Jashar? And the sun stopped in the middle of the sky and did not hasten to go *down* for about a whole day." (New American Standard translation).

<sup>763</sup> December 21, 1613 Letter of Galileo to Castelli published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 49-54, 52: "Given this, I say that this passage shows clearly the falsity and impossibility of the Aristotelian and Ptolemaic world system, and on the other hand agrees very well with the Copernican one."

<sup>764</sup> Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 300, 302.

<sup>765</sup> Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 300, 302.

<sup>766</sup> February 7, 1615 Complaint of Lorini against Galileo published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 134-35. Lorini states: "I have come across a letter that is passing through everybody's hands here, originating among those known as 'Galileists,' who, following the views of Copernicus, affirm that the earth moves and the heavens stand

Friar Caccini gave a deposition against Galileo to the Holy Office in Rome on March 20, 1615.<sup>769</sup> Caccini charged Galileo with suspicion of heresy for holding “two propositions: the earth moves as a whole as well as with diurnal motion; the sun is motionless.”<sup>770</sup> Caccini based his charges on Galileo's letter to Castelli and Galileo's *Sunspot Letters*. He also cited hearsay sources including “public notoriety,” an unnamed Florentine of the Attavanti family, a priest named Father Fernando Ximenes, and the Bishop of Corona.<sup>771</sup>

### **B. Cardinal Bellarmine's Letter to Foscarini (April 12, 1615)**

An assessor retained by the Holy Office to review Galileo's December 21, 1613, letter to Castelli found that “though it sometimes uses improper words, it does not diverge from the pathways of Catholic expression.”<sup>772</sup> Galileo's letter to Castelli, of course, represented only the opinions of a layman and cited no theological authorities. In February or March of 1615, however, the Carmelite theologian and philosopher Paolo Antonio Foscarini awakened the Church hierarchy to a threat of Copernicanism from within its own ranks. Foscarini published a book, *Letter on the Pythagorean and Copernican Opinion of the Earth's Motion and Sun's Rest*,

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still. In the judgment of all our Fathers at this very religious convent of St. Mark, it contains many propositions which to us seem either suspect or rash...”

<sup>767</sup> February 7, 1615 Complaint of Lorini against Galileo published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 135: “And I also inform you that the occasion of my writing was one or two public sermons given in our church of Santa Maria Novella by Father Tommaso Caccini, commenting on the book of Joshua in chapter 10 of the said book.”

<sup>768</sup> February 7, 1615 Complaint of Lorini against Galileo published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 135: “I also beg Your Most Illustrious Lordship that this letter of mine (I am not referring to the other letter mentioned above) be kept secret by you, as I am sure you will, and that it be recorded not as a judicial deposition but only as a friendly notice between you and me, as between a servant and a special patron.”

<sup>769</sup> March 20, 1615 Deposition of Friar Tommaso Caccini published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 136-41.

<sup>770</sup> Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 138.

<sup>771</sup> Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 138.

<sup>772</sup> 1615 Consultant's Report on Galileo's December 21, 1613, Letter to Castelli published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 135-36.

arguing that Copernicanism was compatible with scripture.<sup>773</sup> Many of Foscarini's arguments mirrored those asserted in Galileo's letter to Castelli.<sup>774</sup>

On April 12, 1615, the Jesuit theologian and Cardinal Robert Bellarmine sent a letter to Foscarini commenting on Foscarini's *Letter*. Bellarmine states in his letter that his comments apply to Galileo as well as Foscarini. Bellarmine, the most influential and respected theologian and churchman of his time, makes three points in his letter.<sup>775</sup> First, Bellarmine praises Galileo and Foscarini for “proceeding prudently by limiting yourselves to speaking suppositionally and not absolutely, as I have always believed that Copernicus spoke.”<sup>776</sup>

Second, Bellarmine reminds Foscarini that the Council of Trent prohibits any interpretation of scripture that contradicts the meaning established by the common consensus of the Holy Fathers. “[I]f Your Paternity wants to read not only the Holy Fathers, but also the modern commentaries on Genesis, the Psalms, Ecclesiastes, and Joshua, you will find all agreeing in the literal interpretation that the sun is in heaven and turned around the earth with great speed, and that the earth is very far from heaven and sits motionless at the center of the world.” Bellarmine ominously adds, “consider now, with your sense of prudence, whether the

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<sup>773</sup> Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 300. Foscarini's book, published in Naples in 1615, is entitled *Letter on the Pythagorean and Copernican Opinion of the Earth's Motion and Sun's Rest and on the New The Pythagorean World System, in which are harmonized and reconciled those passages of the Holy Scripture and those theological propositions which can never be adduced against this opinion*.

<sup>774</sup> Like Galileo, Foscarini's exegesis applied the Augustinian interpretive principles of *Accommodation, Scriptural Limitation, Prudence, and Demonstration*. See note 50, *supra*. There is no reason to believe, however, that Foscarini read Galileo's letter to Castelli before composing his own analysis of the compatibility of Copernicanism with scripture. Ernan McMullin, “Galileo's Theological Venture,” *The Church and Galileo*, ed. Ernan McMullin (South Bend, IN: U Notre Dame P, 2005) 88-116, 103.

<sup>775</sup> Maurice A. Finocchiaro, “Introduction,” *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 30. An English translation of Cardinal Bellarmine's April 12, 1615 letter to Foscarini appears at pages 67-69. Pope Pius XI canonized Bellarmine in 1930, and declared Bellarmine a Doctor of the Universal Church in 1931. Bellarmine is the patron saint of catechists.

<sup>776</sup> April 12, 1615, Letter of Cardinal Bellarmine to Foscarini published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 67-69, 67.

Church can tolerate giving Scripture a meaning contrary to the Holy Fathers and to all the Greek and Latin commentators.”<sup>777</sup>

Lastly, Bellarmine closes his letter with a warning. If a demonstration showed that the earth orbited the sun, “then one would have to proceed with great care in explaining the scriptures that appear contrary, and say rather that we do not understand them than that what is demonstrated is false.”<sup>778</sup>

### **C. The Council of Trent and Interpretation of Scripture**

Bellarmino's letter illustrates the emphasis placed by the Roman Catholic Church on controlling scriptural interpretation. Martin Luther initiated the Reformation in 1517. Two Protestant departures from Catholicism include the claim that scripture should be available to every individual in the vernacular, and the claim that every individual should be allowed to interpret scripture for himself.

Scripture was widely interpreted by Protestants as providing that salvation was a gift of God's grace, based on faith alone, and not on works.<sup>779</sup> Salvation therefore did not require compliance with the sacraments of the Roman Catholic Church. Furthermore, every believer served as his own priest with direct access to God.<sup>780</sup> There was thus no need for a clerical hierarchy such as existed in Roman Catholicism, a hierarchy that Protestants viewed as corrupted

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<sup>777</sup> April 12, 1615, Letter of Cardinal Bellarmine to Foscarini published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 67-69, 67-68.

<sup>778</sup> April 12, 1615, Letter of Cardinal Bellarmine to Foscarini published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 67-69, 68-69.

<sup>779</sup> See, e.g., Ephesians 2:8-9: “For by grace you have been saved through faith; and that not of yourselves, it is the gift of God; not as a result of works, so that no one may boast.” Galatians 2:16: “[N]evertheless knowing that a man is not justified by the works of the Law but through faith in Christ Jesus, even we have believed in Christ Jesus, so that we may be justified by faith in Christ and not by the works of the Law; since by the works of the Law no flesh will be justified.” [New American Standard translation].

<sup>780</sup> See Ephesians 2:18: “for through Him [the crucified Christ] we both have our access in one Spirit to the Father.” [New American Standard translation].

by temporal concerns. A broad acceptance of these doctrines threatened the continued existence of Roman Catholicism.

The Council of Trent convened from 1545-1563 to formulate its response to Protestant gains. One of the Council's first concerns was reestablishing a tight control over scriptural interpretation. At its Fourth Session on April 8, 1546, the Council of Trent issued the following decree regarding scriptural interpretation:

Furthermore, to check unbridled spirits, it decrees that no one relying on his own judgment shall, in matters of faith and morals pertaining to the edification of Christian doctrine, distorting the Holy Scriptures in accordance with his own conceptions, *presume to interpret them contrary to that sense which holy mother Church, to whom it belongs to judge of their true sense and interpretation, has held and holds, or even contrary to the unanimous teaching of the Fathers*, even though such interpretations should never at any time be published. Those who act contrary to this shall be made known to ordinaries and punished in accordance with the penalties prescribed by the law.<sup>781</sup>

The Galileo Affair did not involve the authority of *scripture*. It involved the authority of the *Church* to act as the sole interpreter of scripture. Galileo and Foscarini advanced cogent arguments that Copernicanism was consistent with scripture. The Church's objection to Galileo and Foscarini was not that they challenged the authority of scripture *per se*, but rather that their interpretation of scripture conflicted with the interpretation mandated by *the consensus of the Church Fathers*. This was the conduct prescribed by the Council of Trent, and this is why Bellarmine's letter expressly warns Foscarini to consider "whether the Church can tolerate giving Scripture a meaning contrary to the Holy Fathers."<sup>782</sup>

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<sup>781</sup> Maurice A. Finocchiaro, "Introduction," *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 12. The Fifth Session of the Council of Trent also restricted the teaching of scripture on June 17, 1546. Its decree held in part as follows: "[So] that under the semblance of piety impiety may not be disseminated, the same holy council has decreed that no one be admitted to this office of instructor, whether such instruction be public or private, who has not been previously examined and approved by the bishop of the locality as to his life, morals, and knowledge." *Id.*

<sup>782</sup> This is also the reason that Copernicus delayed publishing his *De revolutionibus orbium coelestium* until he was on his deathbed. Maurice A. Finocchiaro, "Introduction," *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 25.

#### **D. The Holy Office's First Investigation of Galileo (November, 1615)**

The Holy Office followed up the March 20, 1615 deposition of Friar Tommaso Caccini by summoning and deposing the two witnesses named by Caccini in his deposition. The Holy Office deposed Father Master Ferdinando Ximenes, a forty-year-old Dominican priest, in Florence on November 13, 1615.<sup>783</sup> The Holy Office deposed Lord Giannozzo Attavanti, a thirty-three year old Florentine nobleman, in Florence on November 14, 1615.<sup>784</sup>

Father Ximenes denied having ever seen or spoken to Galileo. He admitted hearing Galileo's students discussing "the sun's immobility," which Ximenes maintained, "is a doctrine diametrically opposed to true theology and philosophy." Lord Attavanti admitted hearing Galileo defend Copernicanism, but also claimed that "I have never heard Mr. Galileo say things that conflict with Holy Scripture or with our holy Catholic faith." Attavanti referred to Galileo's *Letter on Sunspots* as his main source of information regarding Galileo's views. Eleven days later, on November 25, 1615, the Holy Office decided to examine Galileo's *Letter on Sunspots*.

<sup>785</sup>

#### **E. Galileo Travels to Rome (December, 1615)**

Aware of the gathering opposition to Copernicanism in Rome, as well as rumors that the Holy Office might condemn him, Galileo traveled to Rome in December 1615. Lodging at the

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<sup>783</sup> November 13, 1615, Deposition of Father Master Ferdinando Ximenes published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 141-43.

<sup>784</sup> November 14, 1615, Deposition of Lord Giannozzo Attavanti published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 143-46, 144: "I have never heard Mr. Galileo say things that conflict with Holy Scripture or with our holy Catholic faith. But in regard to philosophical and mathematical matters, I have heard Mr. Galileo say, in accordance with Copernicus's doctrine, that the earth moves both around its center and as a whole, and the sun likewise moved around its center but (viewed from outside) does not have progressive motion, according to some letters published by him in Rome under the title *On Sunspots*, to which I refer in all this."

<sup>785</sup> Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 301, 328 n. 46.

Tuscan embassy, Galileo hoped to prevent the condemnation of Copernicanism and his own disgrace as a heretic.<sup>786</sup>

The Holy Office's examination of Galileo's *Letter on Sunspots* failed to reveal any explicit assertion of the Earth's motion or other presumably heretical assertion.<sup>787</sup> Nevertheless, the Holy Office thought it necessary to consult a panel of eleven expert theologians for an opinion on Friar Caccini's allegations against Galileo in the Caccini deposition of March 20, 1615.<sup>788</sup> The theologians issued their report on February 24, 1616.<sup>789</sup>

The theologians' report first addressed the proposition that “the sun is the center of the world and completely devoid of locomotion.” The consultants unanimously assessed this proposition as “foolish and absurd in philosophy, and formally heretical since it explicitly contradicts in many places the sense of Holy Scripture, according to the literal meaning of the words and according to the common interpretation and understanding of the Holy Fathers and the doctors of theology.”

The report then addressed the proposition that “the Earth is not the center of the world, nor motionless, and it moves as a whole and also with diurnal motion.” The consultants unanimously assessed this proposition, like the first, as foolish and absurd in philosophy. Concerning theological truth, the consultants found that the proposition “is at least erroneous in faith.”

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<sup>786</sup> David Marshall Miller, “The Thirty Years’ War and the Galileo Affair,” *History of Science* 46 (1) (2008): 49-74, 52 n. 20.

<sup>787</sup> Maurice A. Finocchiaro, “Introduction,” *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 29.

<sup>788</sup> Annibale Fantoli, “The Disputed Injunction and Its Role in Galileo's Trial,” *The Church and Galileo*, ed. Ernan McMullin (South Bend, IN: U Notre Dame P, 2005) 117-149, 118. An English translation of Caccini's deposition appears in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 136-41.

<sup>789</sup> February 24, 1616 Consultant's Report on Copernicanism published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 146-47. The report contains the names and ecclesiastical offices of the eleven consultants.



#### IV. Prelude to Galileo's Second Inquisition

##### A. Bellarmine's Oral Warning to Galileo (*circa* March 1, 1616)

A meeting of the Holy Office took place in the presence of Pope Paul V the next day, February 25, 1616. After being informed of the unanimous assessments of the eleven theologians against Galileo's propositions, the Pope ordered Cardinal Bellarmine “to call Galileo before himself and warn him to abandon these opinions; and if he should refuse to obey, the Father Commissary, in the presence of a notary and witnesses, is to issue him an injunction to abstain completely from teaching or defending this doctrine and opinion or from discussing it; and further, if he should not acquiesce, he is to be imprisoned.”<sup>790</sup> The March 3, 1616, minutes of the Holy Office reflect that Cardinal Bellarmine complied with the Pope's order.

When Bellarmine instructed Galileo to abandon these opinions, the minutes reflect that Galileo acquiesced.<sup>791</sup> Therefore, under the Pope's February 25, 1616, order recorded in the minutes, the Father Commissary Michelangelo Segizzi had no authority to issue any injunction to Galileo “in the presence of a notary and witnesses.” The March 3, 1616, minutes do not refer to any such injunction.

Nevertheless, an unsigned, unwitnessed, and unnotarized document purporting to be a copy of such an injunction would be fortuitously “discovered” in 1632. An unprecedented Special Commission, appointed by the Pope to determine whether to prosecute Galileo for

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<sup>790</sup> February 25, 1616, Minutes of the Congregation of the Holy Office published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 147.

<sup>791</sup> March 3, 1616, Minutes of the Congregation of the Holy Office published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 148: “The Most Illustrious Lord Cardinal Bellarmine having given the report that the mathematician Galileo Galilei had acquiesced when warned of the order by the Holy Congregation to abandon the opinion which he held till then, to the effect that the sun stands still at the center of the spheres of the Earth is in motion...”

heresy before the Holy Office, would discover the injunction.<sup>792</sup> The main charge in Galileo's 1633 heresy trial would be that Galileo violated this injunction.

### **B. The Decree of the Index against Copernicanism (March 5, 1616)**

On March 5, 1616, the Congregation of the Index, the arm of the Church responsible for book censorship, published a decree intended to assure that Copernicanism would not “creep any further to the prejudice of Catholic truth.”<sup>793</sup> The decree contained three main points. First, it stated that the doctrine of the earth's motion is false, contrary to the Bible, and a threat to Catholicism. Second, it “completely prohibited and condemned” Foscarini's *Letter on the Pythagorean and Copernican Opinion of the Earth's Motion* in which Foscarini “tries to show that the above-mentioned doctrine of the sun's rest at the center of the world and the earth's motion is consonant with the truth and does not contradict Holy Scripture.”<sup>794</sup> Third, the decree suspended circulation of Copernicus' *On the Revolutions of Spheres* pending its correction and revision.<sup>795</sup>

The Index's March 5, 1616, decree mentions neither Galileo nor his work. Thanks to the efforts of the Florentine Cardinal Maffeo Barberini, the future Pope Urban VIII, Galileo escaped

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<sup>792</sup> Jules Speller, *Galileo's Inquisition Trial Revisited* (Frankfurt: Lang, 2008) 176.

<sup>793</sup> March 5, 1616, Decree of the Congregation of the Holy Office published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 148-49.

<sup>794</sup> Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 148-150, 149. The decree also “prohibits, condemns, and suspends”...“all other books that teach the same” as Foscarini. *Id.*

<sup>795</sup> The Church eventually corrected Copernicus in 1620. The corrections deleted or partially modified approximately one dozen passages containing (a) religious references, or (b) language indicating that Copernicus considered the Earth's motion as a literal description of physical reality, rather than a convenient manner of speaking in order to make astronomical calculations and predictions. Maurice A. Finocchiaro, “Introduction,” *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 30. The Church placed similar restrictions on similar books, including Diego de Zuniga's *On Job*. Zuniga, an Augustinian, argued like Foscarini that Copernicanism was consistent with scripture.

direct condemnation and Copernicanism escaped formal condemnation as a heresy.<sup>796</sup> Galileo even received an audience with Pope Paul V. Galileo reported that he was warmly received by the Pope for three quarters of an hour, and that Pope Paul V reassured Galileo that Galileo “could feel safe” as long as Pope Paul V lived.<sup>797</sup>

### C. Bellarmine's Certificate to Galileo (May 26, 1616)

Although Galileo escaped official censure, he soon began receiving letters from friends in Venice and Pisa recounting that the Congregation of the Holy Office tried and condemned Galileo, forced him to recant, and given him appropriate penalties. Galileo took these letters to Cardinal Bellarmine and persuaded Bellarmine to write a brief and clear statement of what had actually occurred.<sup>798</sup> Bellarmine certified on May 26, 1616, that Galileo had *not* abjured or received any penances. Instead, Galileo had only been “*notified*” that “the doctrine attributed to Copernicus (that the earth moves around the sun and the sun stands at the center of the world without moving from east to west) is contrary to Holy Scripture and therefore cannot be defended or held.”<sup>799</sup>

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<sup>796</sup> Maurice A. Finocchiaro, “Introduction,” *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 32. Barberini was skeptical that anyone could ever disprove Copernicanism necessarily. Since God was omnipotent, God could have created any type of universe He chose, including a geokinetic universe. To argue that the universe was necessarily geostatic erroneously limited God’s omnipotence. *Id.* at 32-33.

<sup>797</sup> March 12, 1616, Letter to the Tuscan Secretary of State published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 151-53. Galileo writes: “I pointed out to His Holiness the maliciousness of my persecutors and some of their false calumnies, and here he answered that he was aware of my integrity and sincerity. Finally, since I appeared somewhat insecure because of the thought that I would be always persecuted by their implacable malice, he consoled me by saying that I could live with my mind at peace, for I was so regarded by His Holiness and the whole Congregation that they would not easily listen to the slanderers, and that I could feel safe as long as he lived.”

<sup>798</sup> Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 302.

<sup>799</sup> May 26, 1616, Certificate of Cardinal Bellarmine, published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 153: “We, Robert Cardinal Bellarmine, have heard that Mr. Galileo Galilei is being slandered or alleged to have abjured in our hands and also to have been given salutary penances for this. Having been sought about the truth of the matter, we say that the above-mentioned Galileo has not abjured in our hands, or in the hands of others here in Rome, or

This certificate, authored by Bellarmine in his own handwriting, provides the most detailed, undisputed, contemporary description of the warning given to Galileo. Importantly, the certificate makes no mention of any injunction by Father Commissary Michelangelo Segizzi to Galileo. Cardinal Bellarmine's May 26, 1616, certificate will provide the foundation of Galileo's defense in 1633.

#### **D. Urban VIII Becomes Pope (August 6, 1623)**

Galileo refrained from defending or explicitly discussing Copernicanism for the next several years. The Florentine Cardinal Maffeo Barberini became Pope Urban VIII in 1623. The election of Barberini as Pope Urban VIII marked the beginning of a chain of political developments that culminated in Galileo's 1633 heresy trial. As a Cardinal, Maffeo Barberini had been Galileo's greatest protector before the Holy Office. Barberini was instrumental in 1616 in preventing the Holy Office from condemning Copernicanism as a heresy and condemning Galileo as a heretic.<sup>800</sup> As the politically vulnerable Pope Urban VIII, however, Barberini would become Galileo's greatest persecutor.

Pope Urban VIII began his reign as an admirer of Galileo, and his personal secretary was one of Galileo's closest acquaintances. When Galileo published *The Assayer (Il Saggiatore)* regarding comets in 1623, Galileo dedicated the book to the new Pope. Galileo even included the Barberini family's crest of three bees on its frontispiece.<sup>801</sup>

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anywhere else that we neither know, any opinion or doctrine of his; nor has he received any penances, salutary or otherwise. On the contrary, he has only been notified of the declaration made by the Holy Father and published by the Sacred Congregation of the Index, whose content is that the doctrine attributed to Copernicus (that the earth moves around the sun and the sun stands at the center of the world without moving from east to west) is contrary to Holy Scripture and therefore cannot be defended or held. In witness whereof we have written and signed this with our own hands, on this 26th day of May 1616. The same mentioned above, Robert Cardinal Bellarmine."

<sup>800</sup> Maurice A. Finocchiaro, "Introduction," *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 32.

<sup>801</sup> An anonymous complainant filed against Galileo with the Congregation of the Holy Office in 1624 claiming that the atomistic theory of matter in Galileo's *The Assayer (Il Saggiatore)* conflicted with the

Galileo visited Rome in the spring of 1624 and stayed for six weeks. The new Pope received Galileo warmly and granted him weekly audiences. Although no record of these conversations survives, subsequent events indicate that Galileo concluded from these meetings that *hypothetical* discussions of Copernicanism, such as its hypothetical consequences or its utility in performing astronomical calculations, were acceptable to the Pope.

#### **E. Galileo's *Dialogue on the Two Chief World Systems* (February 21, 1632)**

Returning to Florence, Galileo began work on the volume that he ultimately published in February 1632, as *Dialogue on the Two Chief World Systems, Ptolemaic and Copernican*. This work catalyzed Galileo's heresy trial in 1633. The *Dialogue* portrays a series of discussions between three men over the course of four days. Salviati is an expert who takes the Copernican side. Simplicio is a scholar who adopts the Ptolemaic side. Sagredo is an intelligent, educated, and inquisitive layman. Sagredo knows little about the topic, but listens carefully and scrutinizes the arguments of the other two.

Notwithstanding his good relations with the new Pope, Galileo's experiences with the Congregation of the Holy Office in 1616 highlighted the need for caution in writing a new work on Copernicanism. Galileo cautiously treated Copernicanism as merely hypothetical throughout the *Dialogue*. Galileo opened the *Dialogue* by proposing the earth's motion as a hypothetical cause of earth's tides. To emphasize the hypothetical character of his new work, Galileo originally entitled it *Dialogue on the Tides*.

The book's censors, however, demanded changes that would help vindicate the March 5, 1616, decree of the Congregation of the Index. That decree had declared that the doctrine of the

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Catholic doctrine of the Holy Sacrament. The exact date and addressee are unknown. Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 202-204, 303. The Council of Trent expressly condemned atomism in 1551, but a friendly inquisitor quickly dismissed the charges against Galileo. David Marshall Miller, "The Thirty Years' War and the Galileo Affair," *History of Science* 46 (1) (2008): 49-74, 58, 70 n. 73.

earth's motion is false, contrary to the Bible, and a threat to Catholicism.<sup>802</sup> The final edition of the book's Preface therefore stated that it sought to prove to non-Catholics that Catholics understood the scientific issues in the Copernican controversy. The Catholic decision to reject Copernicanism in favor of the Ptolemaic model of the universe "did not derive from ignorance of others' thinking." Instead, the Church based its decision on "piety, religion, acknowledgement of divine omnipotence, and the weakness of the human mind."<sup>803</sup>

Even though the scientific arguments presented in the book seem to favor the Copernican model, Galileo's character Salviati presents the arguments for Copernicanism as inconclusive. The Copernican model remains only a hypothesis in the *Dialogue*. Throughout the book, Salviati carefully qualifies his arguments for Copernicanism by insisting that the only purpose of the discussion is to provide information and enlightenment. The discussion does not seek a final resolution of the issue. That is a task reserved for the proper authorities.<sup>804</sup>

As a final caution, Galileo closes the *Dialogue* by repeating Pope Urban VIII's favorite argument regarding Copernicanism. The Pope believed this argument was unanswerable. Since God was omnipotent, God could have created any type of universe He chose, including a Copernican universe. To argue that the universe was necessarily Ptolemaic erroneously limited

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<sup>802</sup> March 5, 1616, Decree of the Congregation of the Holy Office published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 148-49. The decree provided, *inter alia*, "that henceforth no one, of whatever station or condition, shall dare print [Foscarini's *Letter on the Pythagorean and Copernican Opinion of the Earth's Motion* and Copernicus' *On the Revolutions of Spheres*], or have them printed, or read them, or have them in one's possession in any way, under penalty specified in the Holy Council of Trent and in the Index of prohibited books; and under the same penalty, whoever is now or will be in the future in possession of them is required to surrender them to ordinaries or too inquisitors, immediately after learning of the present decree."

<sup>803</sup> Galileo Galilei, "Preface," *Galileo on the World Systems: A New Translation and Guide*, trans. Maurice A. Finocchiaro (Berkeley: U Cal. Press, 1997) 80-81.

<sup>804</sup> Maurice A. Finocchiaro, "Introduction," *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 34-35.

God's omnipotence.<sup>805</sup> After reciting the Pope's argument, Simplicio ends the *Dialogue* by observing that God has the power to accomplish His ends "in many ways, some of them even inconceivable by our intellect. Thus, I immediately conclude that in view of this it would be excessively bold if someone should want to limit and compel divine power and wisdom to a particular fancy of his."<sup>806</sup>

#### **F. Urban VIII and the Thirty Years War (1618-1648)**

The Galileo Affair of 1616-1633 played out against a grander conflict, the Thirty Years War of 1618-1648. The Thirty Years War began as a conflict between Catholics and Protestants, but it also involved the rivalry between the Bourbon and Habsburg dynasties for political preeminence in Europe.<sup>807</sup> As the war developed, Urban VIII attempted to navigate his papacy between the Scylla of France and the Charybdis of Habsburg Europe.

Urban's policies favored France and antagonized the Habsburgs. By 1632, however, Catholic reversals in the Thirty Years War rendered Urban's papacy so vulnerable to Habsburg political initiatives that Urban could no longer act as Galileo's protector. Instead, Urban reversed his field and elected "to use Galileo as a scapegoat to reassert, exhibit, and test his authority and power."<sup>808</sup> The *Dialogue's* cautious presentation of Copernicanism as a mere hypothesis would provide Galileo no protection in the new political environment.

The Thirty Years War began on May 23, 1618, with the second Defenestration of Prague. Two of the Holy Roman Emperor's Legates ordered Bohemian Protestants to stop construction of chapels on Catholic clergymen's land. The Protestants responded by throwing

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<sup>805</sup> Maurice A. Finocchiaro, "Introduction," *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 32-33.

<sup>806</sup> Galileo Galilei, "Ending," *Galileo on the World Systems: A New Translation and Guide*, trans. Maurice A. Finocchiaro (U Cal. Press: Berkeley, 1997) 306-307.

<sup>807</sup> Cicely Veronica Wedgwood, *The Thirty Years War* (New York: New York Review Books, 2005) 271.

<sup>808</sup> Maurice A. Finocchiaro, "Introduction," *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 12.

them out of a high window in the Hradcany castle. The victims survived by landing on a heap of refuse.<sup>809</sup>

Catholics under the leadership of the Habsburgs held the upper hand during the early years of the Thirty Years War. Prior to Urban VIII, the papacy had generally favored the Spanish under the Habsburgs. French support elected Urban Pope in 1623, however, and the new Pope's election reignited the Bourbon and Habsburg rivalry. Fearing that the increase of Habsburg power in the Italian peninsula threatened his own temporal interests, Urban attempted to utilize French influence to thwart Habsburg ambitions on the peninsula.<sup>810</sup>

### **G. The Mantuan Affair (1627-1629)**

The Bourbon and Habsburg rivalry erupted in armed conflict in northern Italy when the Duke of Mantua died without legitimate bodily issue on Christmas Day, 1627. The Duchy rightfully devolved to a French nobleman, but the Habsburgs would not allow a French ally to control the strategically important Duchy, which linked the Habsburg Holy Roman Empire to Habsburg Spain. When the Habsburgs invaded Mantua in 1628, the new Duke of Mantua enlisted French aid. The War of the Mantuan Succession began as a peripheral conflict to the Thirty Years War when a French army crossed the Alps to support the new Duke in 1629.<sup>811</sup>

The Pope supported the French side, and the Habsburgs regarded this as a betrayal. Life in the Vatican during this period was trying for the new Pope. Urban complained that there were so many Spanish spies in the Vatican he could not speak above a whisper.<sup>812</sup> He slept so poorly

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<sup>809</sup> Cicely Veronica Wedgwood, *The Thirty Years War* (New York: New York Review Books, 2005) vii.

<sup>810</sup> David Marshall Miller, "The Thirty Years' War and the Galileo Affair," *History of Science* 46 (1) (2008): 49-74, 58.

<sup>811</sup> David Marshall Miller, "The Thirty Years' War and the Galileo Affair," *History of Science* 46 (1) (2008): 49-74, 59.

<sup>812</sup> Cicely Veronica Wedgwood, *The Thirty Years War* (New York: New York Review Books, 2005) 239.



from worrying about Mantua that he had all the birds in the gardens killed so their chirping would not awaken him during the night.<sup>813</sup>

The Mantuan Affair significantly eroded the political position of the Pope, formerly Galileo's most powerful ally and protector. The Mantuan affair also soured the Vatican's relations with Galileo's Florence. Galileo's Medici patrons felt constrained by Spanish military might to side with the Habsburgs. By 1630, Galileo had lost the political protection of both the Medicis in Tuscany and the Pope in Rome.<sup>814</sup>

#### **H. Catholic Reversals in the Thirty Years War (1630-1632)**

Urban's political position became even more tenuous when the tide of the Thirty Years War turned against the Catholics and the Habsburgs. On July 4, 1630, the Lutheran Gustavus Adolphus of Sweden invaded Germany. After forging an alliance with France and obtaining French financing under the Treaty of Bärwalde on January 23, 1631, Gustavus Adolphus began reversing Catholic and Habsburg gains in the war.

On September 17, 1631, the Protestants crushed the Catholic and Habsburg army at Breitenfeld, near Leipzig. Two thirds of the Catholic forces died and the rest were scattered. The Habsburgs quickly lost control of the Rhine Valley, and the Swedish army invaded the Catholic stronghold of Bavaria in the spring of 1632. In only two years, Protestants had pushed Catholicism in Germany to the verge of extinction. A Swedish invasion of Italy seemed imminent.<sup>815</sup>

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<sup>813</sup> Cicely Veronica Wedgwood, *The Thirty Years War* (New York: New York Review Books, 2005) 239; William R. Shea and Mariano Artigas, *Galileo in Rome: The Rise and Fall of a Troublesome Genius* (Oxford: Oxford UP, 2004) 136.

<sup>814</sup> David Marshall Miller, "The Thirty Years' War and the Galileo Affair," *History of Science* 46 (1) (2008): 49-74, 59.

<sup>815</sup> David Marshall Miller, "The Thirty Years' War and the Galileo Affair," *History of Science* 46 (1) (2008): 49-74, 60.

The Habsburgs blamed Urban VIII for these reversals. They demanded that Urban VIII send them papal troops, give them taxing concessions, and employ such “spiritual arms” as excommunications and interdicts against the Protestant heretics and their allies, including France. Adding to Urban’s political dilemma, France's Chief Minister Cardinal Richelieu privately threatened to break with the Roman Church if the Pope should proceed against France.<sup>816</sup>

Urban VIII responded to these demands by seeking a middle path between the Habsburgs and France. He granted only a small portion of the financial concessions requested by the Habsburgs, even though previous Popes had routinely granted such concessions. Urban VIII also refused the Habsburg’s request for troops, and failed to declare the conflict a holy war. Urban focused instead on persuading France to break with Sweden and intervene on behalf of Catholicism in Germany.<sup>817</sup>

### **I. The “Scandal of the Consistory” (March 8, 1632)**

Urban VIII's policies infuriated the Habsburgs. In the aftermath of the Breitenfeld disaster, the Spanish Ambassador Cardinal Gasparo Borgia confronted the Pope at a consistory meeting on March 8, 1632. Borgia denounced the Pope at this meeting before the entire College of Cardinals, accusing Urban VIII of favoring heretics and lacking apostolic zeal.<sup>818</sup> Borgia even called for a Council to assess the Pope's will and ability to defend Christianity.

Borgia then blamed the Pope for the Catholic reversals in the Thirty Years War. He began reading a statement that ended “... any injury suffered by the Catholic religion must be

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<sup>816</sup> David Marshall Miller, “The Thirty Years’ War and the Galileo Affair,” *History of Science* 46 (1) (2008): 49-74, 61.

<sup>817</sup> Auguste Leman, *Urbain VIII et la rivalité de la France et de maison d'Autriche de 1631 à 1635* (Lille: Paris, 1920) 75; David Marshall Miller, “The Thirty Years’ War and the Galileo Affair,” *History of Science* 46 (1) (2008): 49-74, 61.

<sup>818</sup> Mario Biagioli, *Galileo Courtier: The Practice of Science in the Culture of Absolutism* (Chicago: U of Chicago P, 1994) 335.

ascribed not to himself, the most pious and obedient King [Phillip IV of Spain], but to your Holiness.”<sup>819</sup> The Pope interrupted the ambassador before he finished, and the consistory meeting degenerated into a shouting and shoving match between the cardinals. The Swiss Guard was required to restore order.<sup>820</sup> Borgia distributed the text of his address to each of the cardinals during the melee.

Threats soon arrived from Naples and Spain that their kingdoms might intervene militarily against Urban VIII on the side of Cardinal Borgia. On March 11, 1632, another confrontation ensued between Borgia and the Pope at the Holy Office. Cardinal Ludovico Ludovisi, a supporter of Cardinal Borgia, threatened to have Urban VIII deposed as a protector of heresy by convening a General Council.<sup>821</sup>

News of the “Scandal of the Consistory” and the accusation that the Pope tolerated heresy circulated quickly through the chancelleries of Europe, and tensions mounted. On April 6, 1632, the Holy Roman Emperor's special envoy Cardinal Pázmány charged that Urban VIII was secretly in league with the Protestants, and rumors circulated that Urban was a secret

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<sup>819</sup> Auguste Leman, *Urbain VIII et la rivalité de la France et de maison d'Autriche de 1631 à 1635* (Lille: Paris, 1920) 563-64; David Marshall Miller, “The Thirty Years’ War and the Galileo Affair,” *History of Science* 46 (1) (2008): 49-74, 60-61.

<sup>820</sup> David Marshall Miller, “The Thirty Years’ War and the Galileo Affair,” *History of Science* 46 (1) (2008): 49-74, 60-61. Baigioli describes the ensuing melee as follows: “Borgia went so far as to intimate that perhaps a Council should be convened to assess the Pope's will and ability to defend Christianity. Urban and his nephews tried, unsuccessfully, to silence him. Eventually, Urban's brother [Cardinal Antonio Barberini] got up and walked toward Borgia, apparently intending to grab him and take him out of the room, but was physically stopped by Cardinal Sandoval. Finally, Urban was forced to ring the bell and let the guards into the room to control the unrest. Cardinal Pio broke his glasses while Cardinal Spinola tore his hat in anger. Extremely upset at Borgia and desiring immediate revenge, Urban did his best to have him recalled to Madrid. However, fearing that Spain might try to turn this into a pretext for further, more serious challenges (like a possible military invasion from Naples), he had to wait until 1635 for the cardinal's departure.” Mario Biagioli, *Galileo Courtier: The Practice of Science in the Culture of Absolutism* (Chicago: U of Chicago P, 1994) 335. Accord, Pietro Redondi, *Galileo: Heretic*, trans. Raymond Rosenthal (Princeton: Princeton UP, 1987) 227-232.

<sup>821</sup> Pietro Redondi, *Galileo: Heretic*, trans. Raymond Rosenthal (Princeton: Princeton UP, 1987) 230; David Marshall Miller, “The Thirty Years’ War and the Galileo Affair,” *History of Science* 46 (1) (2008): 49-74, 72 n. 96.

Protestant.<sup>822</sup> On April 7, 1632, Gustavus Adolphus reached Bavaria, the heart of German Catholicism. The Swedes plundered the Jesuit colleges and expelled the Catholic priests.<sup>823</sup>

The Florentine Ambassador, Francesco Niccolini, reported to his government that allegations that Urban VIII protected heresy catalyzed the growing protest against him. According to Niccolini's "authoritative diplomatic source," the Spanish party would use surveillance of orthodoxy and intransigence towards heretics as its political instrument against the Pope.<sup>824</sup>

### **J. Urban VIII Decides to Prosecute Galileo**

Thus, in the spring of 1632, Pope Urban VIII found his position in real and immediate jeopardy.<sup>825</sup> A powerful Protestant army, brilliantly led by Gustavus Adolphus and financed by France, was massing beyond the Alps to invade Italy. The Pope even faced military threats from the Catholic kingdoms of Naples and Spain.

The Spanish party sought his deposition for leniency towards heretics. "Cardinal Borgia had dominated the consistory and isolated the pope, who knew that he could now count only on his relatives."<sup>826</sup> The Pope was politically, psychologically, and physically isolated.<sup>827</sup>

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<sup>822</sup> David Marshall Miller, "The Thirty Years' War and the Galileo Affair," *History of Science* 46 (1) (2008): 49-74, 72 n. 96.

<sup>823</sup> Pietro Redondi, *Galileo: Heretic*, trans. Raymond Rosenthal (Princeton: Princeton UP, 1987) 231.

<sup>824</sup> Pietro Redondi, *Galileo: Heretic*, trans. Raymond Rosenthal (Princeton: Princeton UP, 1987) 230.

<sup>825</sup> David Marshall Miller, "The Thirty Years' War and the Galileo Affair," *History of Science* 46 (1) (2008): 49-74, 60.

<sup>826</sup> Pietro Redondi, *Galileo: Heretic*, trans. Raymond Rosenthal (Princeton: Princeton UP, 1987) 230.

<sup>827</sup> Urban was undergoing a psychologically difficult period in which he perceived himself encircled by enemies. Fernando Gregorovius, *Urbano VIII e la sua opposizione alla Spagna e all'imperatore* (Rome: Fratelli Bocca, 1879) 61. Urban ousted his private secretary, Galileo's friend and supporter Giovanni Ciampoli, for participating in a Spanish conspiracy to overthrow Pope Urban VIII. Mario Biagioli, *Galileo Courtier: The Practice of Science in the Culture of Absolutism* (Chicago: U of Chicago P, 1994) 335 n. 96. Urban VIII was a superstitious man, particularly sensitive to negative horoscopes, and his political difficulties seemed to heighten his paranoia. Fearing poison, the Pope secluded himself in Castel Gandolfo fifteen miles from Rome. Fearing a naval attack from Tuscany and a land attack from Naples, Urban VIII

At precisely this moment in history, on February 21, 1632, the first copies of Galileo's *Dialogue on the Two Chief World Systems* appeared in Florence. Scientific circles received the book well, but a number of complaints soon emerged from Rome.<sup>828</sup> Galileo could no longer rely on the Pope to protect him from these complaints.<sup>829</sup>

It was imperative that Urban VIII appear to act forcefully, and soon. "The Pope needed to make an example of someone, and Galileo was his man."<sup>830</sup> Galileo provided the scapegoat Urban VIII needed to reassert his authority and demonstrate that he was a firm, decisive, and great papal prince.<sup>831</sup> On Urban's orders, the Congregation of the Index stopped all sales of Galileo's *Dialogue* during the summer of 1632 and confiscated all unsold copies.<sup>832</sup>

#### **K. Political Advantages of Prosecuting Galileo**

The prosecution of Galileo offered Pope Urban VIII four political advantages.<sup>833</sup> First, Galileo was famous and politically connected. Humbling Galileo would prove that the Pope still controlled the lives of powerful men.<sup>834</sup>

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had the road to Rome patrolled, and required searches of all visitors. Mario Biagioli, *Galileo Courtier: The Practice of Science in the Culture of Absolutism* (Chicago: U of Chicago P, 1994) 336.

<sup>828</sup> Maurice A. Finocchiaro, "Introduction," *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 35.

<sup>829</sup> Urban believed that Galileo had conspired with Urban's private secretary Giovanni Ciampoli to betray him by publishing the *Dialogue*. Mario Biagioli, *Galileo Courtier: The Practice of Science in the Culture of Absolutism* (Chicago: U of Chicago P, 1994) 336-37, n. 104-08.

<sup>830</sup> David Marshall Miller, "The Thirty Years' War and the Galileo Affair," *History of Science* 46 (1) (2008): 49-74, 62-63.

<sup>831</sup> Maurice A. Finocchiaro, "Introduction," *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 12.

<sup>832</sup> Maurice A. Finocchiaro, "Introduction," *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 35.

<sup>833</sup> David Marshall Miller, "The Thirty Years' War and the Galileo Affair," *History of Science* 46 (1) (2008): 49-74, 62.

<sup>834</sup> Pietro Redondi, *Galileo: Heretic*, trans. Raymond Rosenthal (Princeton: Princeton UP, 1987) 259. Redondi writes that Galileo's 1633 trial was politically inevitable because "a public demonstration of renewed firmness was required."

Second, Galileo's *Dialogue on the Two Chief World Systems* was only mildly heretical, if it was heretical at all.<sup>835</sup> Censors in both Rome and Florence gave the work their imprimatur prior to its publication. The heresy prosecution of Galileo under the Pope's direction would demonstrate that Urban VIII was a diligent and aggressive defender of the faith. It would also undermine Spanish accusations that Urban VIII was weak on heresy.<sup>836</sup>

Third, Galileo was a Tuscan. His Medici patrons were allies of Urban's Habsburg adversaries. Punishing Galileo punished the Medici for siding against Urban. Punishing Galileo showed the world the perils of opposing the Pope.<sup>837</sup>

Fourth, Galileo offended Urban by placing Urban's arguments in the mouth of Simplicio, the clear loser in the debate of the *Dialogue*. The *Dialogue* argued for Copernicanism by tacitly mocking the Pope. The Pope's political circumstances could not permit any personal insult to go unpunished.<sup>838</sup>

## **V. Galileo's Second Inquisition**

### **A. The Special Commission**

Pope Urban VIII could not reap the political benefits of prosecuting Galileo unless the public perceived Urban as personally engaged in the proceedings. The Congregation of the Holy

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<sup>835</sup> Maurice A. Finocchiaro, "The Methodological Background to Galileo's Trial," *Reinterpreting Galileo*, ed. William A. Wallace (Washington: Catholic U of America P, 1986) 241-72.

<sup>836</sup> David Marshall Miller, "The Thirty Years' War and the Galileo Affair," *History of Science* 46 (1) (2008): 49-74, 62-63.

<sup>837</sup> David Marshall Miller, "The Thirty Years' War and the Galileo Affair," *History of Science* 46 (1) (2008): 49-74, 62-63. Miller also explains that Urban used Galileo to manipulate his ongoing attempts to negotiate an Italian League as a Catholic alliance headed by Tuscany in the Thirty Years War. The papacy regarded the Italian League as a politically preferable alternative to the Habsburg-controlled Catholic League. *Id.*

<sup>838</sup> David Marshall Miller, "The Thirty Years' War and the Galileo Affair," *History of Science* 46 (1) (2008): 49-74, 61.

Office, however, cloaked every aspect of its heresy trials in secrecy. The Holy Office justified its secrecy as necessary to prevent further dissemination of heresy.<sup>839</sup>

In order to avoid this secrecy requirement, Urban appointed a three member Special Commission to examine the *Dialogue* and investigate its publication before referring Galileo's case to the Holy Office.<sup>840</sup> The three Special Commissioners were Agostino Oreggi, Melchior Inchofer, and Niccolo Riccardi. Each Special Commissioner was unfriendly to Galileo.<sup>841</sup> The Special Commission answered to the Pope's loyal nephew, Cardinal Francesco Barberini, ensuring Urban's control of Galileo's case.<sup>842</sup>

The Special Commission met five times and reported its findings in September, 1632. The Commission's findings asserted four complaints against Galileo's *Dialogue*. The most

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<sup>839</sup> Wade Rowland, *Galileo's Mistake: A New Look at the Epic Confrontation between Galileo and the Church* (New York: Arcade, 2003) 242-43; Henry Charles Lea, *The Inquisition of the Middle Ages: Its Organization and Operation* (New York: Citadel, 1954) 102. Members of the Holy Office, in fact, faced severe punishment for speaking or writing about past or present cases. Richard J. Blackwell, *Behind the Scenes at Galileo's Trial: Including the First English Translation of Melchior Inchofer's Tractatus syllepticus* (Notre Dame, IN: U of Notre Dame P, 2006) 7.

<sup>840</sup> David Marshall Miller, "The Thirty Years' War and the Galileo Affair," *History of Science* 46 (1) (2008): 49-74, 62-63. See the September, 1632, Special Commission Report on the *Dialogue*, published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 218-22.

<sup>841</sup> Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 355 n. 64. Agostino Oreggi was originally a member of Cardinal Bellarmine's entourage. He became papal theologian when Bellarmine became Pope Urban VIII. Oreggi also reviewed Galileo's *Dialogue* as a consultant for the Holy Office. See April 17, 1633, Report on the *Dialogue* by Agostino Oreggi published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 262. Melchior Inchofer was a Jesuit who taught philosophy, mathematics, and theology at the University of Messina. He also reviewed Galileo's *Dialogue* as a consultant for the Holy Office and wrote the most hostile appraisal of the work. See April 17, 1633, Report on the *Dialogue* by Melchior Inchofer published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 262-70. Niccolo Riccardi served as Master of the Sacred Palace beginning in 1629. His duties included serving as president of the papal theological faculty.

<sup>842</sup> August 15, 1632, Diplomatic Correspondence published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 227: "I have not been able yet to see the Master of the Sacred Palace in regard to the question of Mr. Galilei. However, because I hear that there has been set up a commission of persons versed in this profession, all unfriendly to Galileo, responsible to the Lord Cardinal Barberini, I have decided to speak about it to His Imminence himself at the earliest opportunity." *Accord*, David Marshall Miller, "The Thirty Years' War and the Galileo Affair," *History of Science* 46 (1) (2008): 49-74, 63.

serious complaint was that Galileo violated an injunction dated February 26, 1616.<sup>843</sup> The Special Commission first discovered this injunction, in 1632.<sup>844</sup> Father Michelangelo Segizzi, the Father Commissary of the Holy Office, putatively issued it to Galileo in 1616.<sup>845</sup>

The second complaint was that Galileo's *Dialogue* presented Copernicanism “absolutely” as a factual matter. The third complaint was that the book was actually a defense of Copernicanism. Galileo presented Ptolemaic as “impossible” but treated Copernican arguments “as demonstrative and necessary.” The fourth complaint involved a series of irregularities in obtaining the various permissions required for publication.

The Special Commission considered Galileo’s violation of the Segizzi injunction to be irreparable.<sup>846</sup> Since the injunction recited that Galileo acquiesced to its terms “and promised to obey,” the Special Commission concluded that Galileo's case *must* be forwarded to the Congregation of the Holy Office.”<sup>847</sup>

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<sup>843</sup> September, 1632, Special Commission Report on the Dialogue, published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 218-22, 222: “7. In 1616 the author had from the Holy Office the injunction that 'he abandon completely the above-mentioned opinion that the sun is the center of the world and the earth moves, nor henceforth hold, teach, or defend in any way whatever, orally or in writing; otherwise the Holy Office would start proceedings against him. He acquiesced in this injunction and promised to obey.'” This reference in the Special Commission's findings is the first mention of this injunction anywhere in Galileo’s record. The document relied upon by the Special Commission was unsigned, unwitnessed, and unnotarized. Later sections discuss the authenticity of this injunction in detail below.

<sup>844</sup> Jules Speller, *Galileo's Inquisition Trial Revisited* (Frankfurt: Lang, 2008) 176.

<sup>845</sup> February 26, 1616, Special Injunction of the Father Commissary of the Holy Office to Galileo, published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 147-48. Every other complaint in the Special Commission’s Report “could be emended if the book were judged to have some utility which would warrant such a favor.”

<sup>846</sup> September, 1632, Special Commission Report on the Dialogue, published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 218-22, 222.

<sup>847</sup> September 25, 1632 Letter of Cardinal Barberini to the Florentine Nuncio published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 222-23.



## B. Galileo is Summoned to Rome

Pope Urban VIII accepted the Special Commission's conclusions and forwarded Galileo's case to the Holy Office for prosecution. At a meeting of the Holy Office on September 23, 1632, chaired by the Pope, the Holy Office summoned Galileo to Rome.<sup>848</sup>

Galileo and the Tuscan government spent the autumn of 1632 attempting to move Galileo's trial from Rome to Florence.<sup>849</sup> When these efforts failed, Galileo made out his will and left for Rome on January 20, 1633.<sup>850</sup> Sixty-eight years old and ill, Galileo traveled three weeks through plague-infested regions to complete the journey. When Galileo arrived in Rome on February 13, 1633, the Holy Office told him to wait in seclusion until authorities called him for interrogation.

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<sup>848</sup> David Marshall Miller, "The Thirty Years' War and the Galileo Affair," *History of Science* 46 (1) (2008): 49-74, 62-63; Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 305.

<sup>849</sup> On October 13, 1632, Galileo wrote to Cardinal Francesco Barberini, the Pope's nephew, requesting him to move the trial to Florence. Alternatively, Galileo requested that the Holy Office state the charges against him in writing and allow Galileo to answer them in writing. The Holy Office, chaired by the Pope, denied these requests at a meeting on November 11, 1632. Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 305. On December 11, 1632, three Florentine physicians signed a certificate that they had examined Galileo and found him in such ill health that the least external problem would pose a danger to his life. Galileo would have to travel through plague-infested regions to reach Rome, so the risk of death for Galileo was significant. A December 30, 1632, meeting of the Holy Office chaired by the Pope considered the medical certificate and disregarded it. The Holy Office responded by sending Galileo an ultimatum. If Galileo did not come to Rome of his own accord, the Holy Office would send officers to Florence to bring Galileo to Rome in chains. Maurice A. Finocchiaro, "Introduction," *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 36.

<sup>850</sup> January 15, 1633 Letter of Galileo to Elia Diodati published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 223-26. Galileo describes himself as "troubled" and states the following: "I am about to go to Rome, summoned by the Holy Office, which has already suspended my *Dialogue*. From reliable sources, I hear the Jesuit Fathers have managed to convince some very important persons that my book is execrable and more harmful to the Holy Church than the writings of Luther and Calvin. Thus I am sure it will be prohibited, despite the fact that to obtain the license I went personally to Rome and delivered into the hands of the Master of the Sacred Palace; he examined it very minutely (changing, adding, and removing as much as he wanted), and after licensing it he also ordered it to be reviewed again here [in Florence]. This reviewer did not find anything to modify, and so, as a sign of having read and examined it most diligently, he resorted to changing some words; for example, in many places he said *universe* instead of *nature*, *title* instead of *attribute*, *sublime* mind in place of *divine*; and he asked to be excused by saying that he predicted I would be dealing with very bitter enemies and very angry persecutors, as indeed it followed."

The Holy Office kept Galileo waiting for a month. According to government officials, Galileo's trip to Rome and the anxiety of waiting once he got there were partial punishment in advance of Galileo's proceeding.<sup>851</sup> The Holy Office decided Galileo's guilt months before his trial began.

### **C. Galileo's First Deposition (April 12, 1633)**

Galileo's first deposition took place on April 12, 1633. The questions focused on the events of 1616 and his 1632 *Dialogue*.<sup>852</sup> Galileo admitted that he had written the *Dialogue*. Galileo also admitted receiving an oral admonition from Cardinal Bellarmine to abandon Copernicanism. Galileo's testimony was completely consistent with the March 3, 1616, minutes of the Holy Office.<sup>853</sup>

The Holy Office then surprised Galileo by confronting him with the February 26, 1616, Segizzi injunction. In contrast to Cardinal Bellarmine's gentle warning that Copernicanism "cannot be defended or held," the unsigned, unwitnessed, and unnotarized Segizzi injunction sternly ordered Galileo to "abandon completely the above-mentioned opinion that the sun is the center of the world and the earth moves, nor henceforth hold, teach, or defend in any way whatever, orally or in writing; otherwise the Holy Office would start proceedings against

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<sup>851</sup> Maurice A. Finocchiaro, "Introduction," *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 36.

<sup>852</sup> April 12, 1633, Deposition of Galileo published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 256-62.

<sup>853</sup> March 3, 1616, Minutes of the Congregation of the Holy Office published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 148. The Minutes of March 3, 1616 record that Galileo "acquiesced when warned of the order by the Holy Congregation to *abandon the opinion* which he held till then, to the effect that the sun stands still at the center of the spheres of the Earth is in motion." [Emphasis added].

him.”<sup>854</sup> The Segizzi injunction recited that Galileo had acquiesced to its terms and promised to obey them.

Galileo denied that he had ever received such an injunction or been informed of such terms. He further denied that the *Dialogue* violated any of the terms of the false injunction. “With the said book I had neither held nor defended the opinion of the earth’s motion and the sun’s stability; on the contrary, in the said book I show the contrary of Copernicus’s opinion and show that Copernicus’s reasons are invalid and inconclusive.”<sup>855</sup>

Galileo then dropped his own bombshell on the Holy Office. To corroborate his testimony, Galileo produced a copy of Cardinal Bellarmine’s May 26, 1616, certificate describing the events of 1616.<sup>856</sup> Cardinal Bellarmine’s certificate corroborated Galileo’s testimony that Cardinal Bellarmine had only warned Galileo that “Copernicanism cannot be defended or held.” Bellarmine’s certificate made no mention of the Segizzi injunction or its terms. Galileo further advised the Holy Office that he had brought the *original* to Rome in Cardinal Bellarmine’s *own handwriting*.

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<sup>854</sup> February 26, 1616, Special Injunction of the Father Commissary of the Holy Office to Galileo, published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 147-48.

<sup>855</sup> April 12, 1633, Deposition of Galileo published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 262.

<sup>856</sup> May 26, 1616, Certificate of Cardinal Bellarmine, published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 153: “We, Robert Cardinal Bellarmine, have heard that Mr. Galileo Galilei is being slandered or alleged to have abjured in our hands and also to have been given salutary penances for this. Having been sought about the truth of the matter, we say that the above-mentioned Galileo has not abjured in our hands, or in the hands of others here in Rome, or anywhere else that we know, any opinion or doctrine of his; nor has he received any penances, salutary or otherwise. On the contrary, he has only been notified of the declaration made by the Holy Father and published by the Sacred Congregation of the Index, whose content is that the doctrine attributed to Copernicus (that the earth moves around the sun and the sun stands at the center of the world without moving from east to west) is contrary to Holy Scripture and therefore cannot be defended or held. In witness whereof we have written and signed this with our own hands, on this 26th day of May 1616. The same mentioned above, Robert Cardinal Bellarmine.”

The production of Bellarmine's certificate surprised and disoriented Galileo's inquisitors. Their carefully orchestrated strategy, beginning with the Special Commission's Report,<sup>857</sup> depended on the authenticity of the Segizzi injunction. Since the false injunction was an unexecuted, unwitnessed, and unnotarized document that was not referenced anywhere in the 1616 record, the inquisitors' strategy depended on the Holy Office's intimidating Galileo.

Their strategy was a breathtaking failure. The Bellarmine certificate, unknown to the strategists in the Holy Office when they planned Galileo's trial, cast irresolvable doubts on the authenticity of the Segizzi injunction. To make matters worse, Galileo was the only surviving witness from the 1616 proceeding who could corroborate the authenticity of the unexecuted Segizzi injunction.<sup>858</sup> Cardinal Bellarmine died in 1621,<sup>859</sup> and Commissary General Segizzi died in 1625.<sup>860</sup>

By the end of Galileo's first deposition, the inquisitors realized that the Segizzi injunction was uncorroborated and that its authenticity was unprovable. Galileo's oral testimony and Cardinal Bellarmine's certificate conclusively impeached its authenticity. Cardinal Bellarmine's certificate, on the other hand, was unimpeachable. Galileo possessed the original, and the entire certificate was in Bellarmine's own writing.

Galileo's testimony was consistent with the entirety of the legal record. The Segizzi injunction was entirely inconsistent. The only explanation accounting for all these facts was that the recently discovered Segizzi injunction was a subterfuge.

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<sup>857</sup> September, 1632, Special Commission Report on the Dialogue, published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 218-22, 222.

<sup>858</sup> The Segizzi injunction recited that Commissary General Segizzi had delivered the injunction to Galileo. Galileo had promised to obey it in Cardinal Bellarmine's presence at Cardinal Bellarmine's residence on February 26, 1616. February 26, 1616, Special Injunction of the Father Commissary of the Holy Office to Galileo, published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 147-48.

<sup>859</sup> Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 314.

<sup>860</sup> Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 322.

The Holy Office abruptly ended Galileo's deposition. The Holy Office swore Galileo to silence regarding the day's proceedings and ordered him to remain in its headquarters.<sup>861</sup> Galileo's inquisitors would take two weeks before deciding on their next step.

#### **D. The Consultants' Reports on the *Dialogue* (April 17, 1633)**

Five days later, on April 17, 1633, three theologians retained as consultants by the Holy Office issued formal evaluations of Galileo's *Dialogue*.<sup>862</sup> Consultant Agostino Oreggi found that Galileo "held and defended" Copernicanism.<sup>863</sup> The other two consultants found that Galileo violated the Segizzi injunction.<sup>864</sup> Consultant Melchior Inchofer found that Galileo "teaches and defends" Copernicanism, and further that Galileo "is vehemently suspected of firmly adhering to this opinion, and indeed that he holds it."<sup>865</sup> Consultant Zaccaria Pasqualigo concluded that Galileo violated the Segizzi injunction's prohibition not to "teach or defend" Copernicanism, and "strongly suspected" Galileo of "holding" Copernicanism.<sup>866</sup>

#### **E. The Plea Bargain (April 27, 1633)**

After the unfavorable developments in Galileo's first deposition, it took until April 27, 1633, for Commissary General Fra Vincenzo Maculano da Firenzuola to decide on his next move. Firenzuola approached Galileo with a deal. If Galileo would confess his error, then the

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<sup>861</sup> Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 37, 262. The Holy Office housed Galileo in the chief prosecutor's apartment.

<sup>862</sup> The three members were Agostino Oreggi, Melchior Inchofer, and Niccolo Riccardi. Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 355 n. 64. Two of the consultants were members of the papal Special Commission. Agostino Oreggi and Melchior Inchofer also served as consultants to the Holy Office in Galileo's 1633 proceeding.

<sup>863</sup> April 17, 1633, Report on the *Dialogue* by Agostino Oreggi published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 262.

<sup>864</sup> September, 1632, Special Commission Report on the *Dialogue*, published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 218-22.

<sup>865</sup> April 17, 1633, Report on the *Dialogue* by Melchior Inchofer published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 262-70, 262.

<sup>866</sup> April 17, 1633, Report on the *Dialogue* by Zaccaria Pasqualigo published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 271-76, 271.

Holy Office would enter into an unprecedented “extrajudicial” resolution of Galileo's case. Galileo’s punishment would be limited to imprisonment in his own house. The aged Galileo, suffering from poor health and the mental strain of ten weeks' isolation, tentatively accepted the offer. He requested “a little time,” however, “to think about the way to render his confession honest.”<sup>867</sup>

The Commissary General wrote a letter the next day hoping to persuade Cardinal Francesco Barberini to approve this course of action.<sup>868</sup> If Cardinal Barberini agreed, the Commissary General would depose Galileo again and place Galileo's agreed confession on the record.

#### **F. Galileo’s Second Deposition (April 30, 1633)**

Cardinal Barberini agreed with the plan, and the Holy Office recalled Galileo for a second deposition. The inquisitors instructed Galileo to answer one question: “That he state whatever he wished to say.”<sup>869</sup> Galileo answered that he had reread the *Dialogue* since his earlier deposition on April 12, 1633. Not having seen the book for so long, Galileo explained, “I found it almost a new book by another author.”

Galileo now freely confessed that the arguments for Copernicanism based on sunspots and the tides were too strong and presented too powerfully. “If I had to write out the same arguments now,” he testified, “there is no doubt I would weaken them in such a way that they could not appear to exhibit a force which they really and essentially lack.”

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<sup>867</sup> April 28, 2011 Letter from the Commissary General to Cardinal Barberini, published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 276-77.

<sup>868</sup> April 28, 2011 Letter from the Commissary General to Cardinal Barberini, published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 277: “The Tribunal will maintain its reputation; the culprit can be treated with the benignity; and, what ever the final outcome, he will know the favor done to him, with all the consequent satisfaction one wants in this.”

<sup>869</sup> April 30, 1633, Deposition of Galileo published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 277-79.

Galileo insisted that the arguments in the *Dialogue*, although erroneous, did not result from any heretical intent on Galileo's part. Quoting Cicero, Galileo claimed that his fault was simply being “more desirous of glory than was suitable.” “My error then was, and I confess it, one of vain ambition, pure ignorance, and inadvertence.”<sup>870</sup>

The inquisitors closed the deposition and swore Galileo to silence, but Galileo's mild confession did not satisfy them. The record states that Galileo returned “after a little” and finally told the Holy Office what it wanted to hear:

And for greater confirmation that *I neither did hold nor do hold as true the condemned opinion of the earth's motion and sun's stability*, if, as I desire, I am granted the possibility and the time to prove it more clearly, I am ready to do so... I promise to reconsider the arguments already presented in favor of the said *false and condemned opinion* and to confute them in the most effective way that the blessed God will enable me. So I beg this Holy Tribunal to cooperate with me in this good resolution, by granting me the permission to put it into practice. [Emphasis added].<sup>871</sup>

The inquisitors then allowed the exhausted Galileo to return to the Tuscan embassy, ordering him not to discuss his case with anyone. The Holy Office ordered Galileo to remain at the Tuscan embassy until summoned to return.<sup>872</sup>

### **G. Galileo's Third Deposition and Defense (May 10, 1633)**

Galileo was recalled for a third deposition on May 10, 1633, and informed that he could make a defense to the Holy Office within eight days if he so wished.<sup>873</sup> Galileo chose to make his defense that very day.<sup>874</sup> Producing the original of Cardinal Bellarmine's May 26, 1616,

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<sup>870</sup> April 30, 1633, Deposition of Galileo published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 277-79, 278.

<sup>871</sup> April 30, 1633, Deposition of Galileo published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 277-79, 278-79.

<sup>872</sup> Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 306.

<sup>873</sup> May 10, 1633, Deposition of Galileo, published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 279.

<sup>874</sup> May 10, 1633, Defense of Galileo, published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 279-281, 279.

certificate,<sup>875</sup> Galileo explained that the certificate did *not* contain the injunction against “teaching” Copernicanism “in any way whatsoever” contained in the contested Segizzi injunction.

Galileo further argued that any “flaws” in the *Dialogue* were “inadvertent.” Such flaws “were not introduced through the cunning of an insincere intention, but rather through the vain ambition of appearing clever above and beyond the average among popular writers.”<sup>876</sup> Galileo closed his defense by appealing to the “clemency and kindness” of his inquisitors. He asked them to consider that this process had already taken years off his life due to his declining health, his ten months of constant mental distress, and his long and tiresome journey to Rome.

#### **H. The Pope Threatens Galileo with Torture (June 21, 1633)**

The Holy Office drafted its Final Report to the Pope summarizing Galileo’s deposition testimony in May or June of 1633.<sup>877</sup> The trial could have ended at this point, but the Pope was not yet satisfied.<sup>878</sup> The Pope ordered yet another deposition of Galileo, but this fourth deposition would be different. The Pope now ordered that the inquisitors conduct the fourth deposition under a formal threat of torture.<sup>879</sup>

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<sup>875</sup> May 26, 1616, Certificate of Cardinal Bellarmine, published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 153

<sup>876</sup> May 10, 1633, Defense of Galileo, published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 279-281, 281.

<sup>877</sup> Final Report to the Pope, published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 281-86.

<sup>878</sup> Maurice A. Finocchiaro, “Introduction,” *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 38.

<sup>879</sup> David Marshall Miller, “The Thirty Years’ War and the Galileo Affair,” *History of Science* 46 (1) (2008): 49-74, 65. The procedure manual for the Holy Office contained an entire chapter entitled “On the Manner of Interrogating Culprits by Torture.” Eliseo Masini, *Sacro Arsenale Pvero Prattica Dell’ufficio Della Santa Inquisizione* (Genoa: Appresso Giuseppe Pavoni, 1621) 120-51. The chapter begins as follows: “The culprit having denied the crimes with which he has been charged, and the latter not having been fully proved, in order to learn the truths it is necessary to proceed against him by means of a rigorous examination; in fact, the function of torture is to make up for the shortcomings of witnesses, when they



Galileo's fourth deposition took place on June 21, 1633. Galileo "was told to tell the truth, otherwise one would have recourse to torture."<sup>880</sup> Galileo replied by insisting that he was not a Copernican. He wrote the *Dialogue*, not because he thought Copernicanism was true, but rather to render a "beneficial service." Returning to the favorite argument of Pope Urban VIII, the argument Galileo had placed in the mouth of Simplicio at the end of the *Dialogue*, Galileo stated that his intent in the *Dialogue* was to demonstrate that physical and astronomical evidence was inadequate to prove Copernicanism with certainty. Galileo concluded by stating, "I do not hold this opinion of Copernicus, and I have not held it after being ordered by injunction to abandon it. For the rest, here I am in your hands; do as you please."<sup>881</sup>

### **I. Galileo's Condemnation and Abjuration (June 22, 1633)**

The Holy Office condemned Galileo the next day for rendering himself "according to this Holy Office vehemently suspected of heresy."<sup>882</sup> The basis of the condemnation was Galileo's holding and believing "a doctrine which is false and contrary to the divine and Holy Scripture." This doctrine was "that the sun is the center of the world and does not move from east to west, and the earth moves and is not the center of the world, and that one may hold and defend as probable an opinion after has it been declared and defined contrary to Holy Scripture."<sup>883</sup>

The Holy Office offered to absolve Galileo on condition that he "abjure, curse, and detest" these heresies. Galileo made a public abjuration that same day at the Church of Santa

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cannot deduce a conclusive proof against the culprit." Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 363 n. 84.

<sup>880</sup> June 21, 1633, Deposition of Galileo, published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 286-87.

<sup>881</sup> June 21, 1633, Deposition of Galileo, published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 287.

<sup>882</sup> June 22, 1633, Sentence of Galileo, published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 287-91, 291.

<sup>883</sup> June 22, 1633, Sentence of Galileo, published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 287-91, 291.

Maria sopra Minerva.<sup>884</sup> In order to make an example of Galileo “so that others would abstain from similar crimes in the future,” the Holy Office prohibited the sales of Galileo’s *Dialogue on the Two Chief World Systems*.<sup>885</sup> The Holy Office also assigned Galileo a penance of reciting the seven penitential Psalms once a week for the next three years. Lastly, Galileo was condemned to formal imprisonment in the Holy Office at its pleasure.

Three of the ten inquisitors found the Sentence too lenient and refused to sign it. One was Cardinal Gaspare Borgia, the Spanish ambassador and leader of the Spanish party. Borgia had confronted the Pope in the “Scandal of the Consistory” a year earlier, and it was Borgia’s supporters who sought to depose Urban VIII for leniency towards heretics.<sup>886</sup> If not for Borgia, Galileo’s 1633 prosecution may never have happened.

After six months, the Holy Office finally allowed Galileo to return to Tuscany. Galileo lived the remainder of his life under house arrest in Arcetri, near Florence, and died on January 8, 1642. He rests in a plain grave with no inscription in the Church of Santa Croce in Florence.<sup>887</sup> Since 1927, the Museo di Storia della Scienza in Florence has displayed the fully extended middle finger of Galileo’s right hand in a gold and crystal receptacle.

Pope Urban VIII survived the Spanish threats and remained Pope for eleven more years until his death in 1644. His policies made him unpopular. Upon his death, protestors destroyed his bust on Capitoline Hill.

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<sup>884</sup> June 22, 1633, Abjuration of Galileo, published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 292-93: “With sincere heart and unfeigned faith I abjure, curse, and detest the aforesaid errors and heresies, and generally every other error, heresy, and sect whatsoever contrary to the said Holy Church, and I swear that in the future I will never again say or assert, verbally or in writing, anything that might furnish occasion for a similar suspicion regarding me.”

<sup>885</sup> June 22, 1633, Sentence of Galileo, published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 287-91, 291.

<sup>886</sup> Maurice A. Finocchiaro, “Introduction,” *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 38.

<sup>887</sup> Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 307.

## VI. Evaluation of Galileo's Second Inquisition

### A. Galileo's Second Inquisition was a Staged Political Trial

The records of Galileo's prosecutions by the Holy Office compel the conclusion that the 1633 prosecution of Galileo was a staged show trial with a predetermined outcome. Galileo's prosecution consisted of a coordinated series of extraordinary legal maneuvers, unsupported by any authenticated evidence, pursued for the political end of preserving Urban VIII's papacy during a period of political and military crisis.

The most disturbing aspect of the Galileo Affair is the inquisitors' reliance on the “false” Segizzi injunction of February 26, 1616. The Holy Office never authenticated the Segizzi injunction, and its authentication became impossible after Galileo's first deposition. The Holy Office nevertheless retained the Segizzi injunction as the centerpiece of its strategy. There is no evidence that Galileo ever received the Segizzi injunction. To the contrary, the record of the Galileo Affair from 1616 to 1633 supports the conclusion that the Segizzi injunction was a subterfuge. Seven grounds compel this conclusion.

First, *no one has ever seen the Segizzi injunction*. Although Galileo's entire 1633 heresy trial hinged on the authenticity of the Segizzi injunction,<sup>888</sup> no one has ever seen the original. Although the Segizzi injunction is clearly the most important document in the Galileo Affair, it is the *only* document missing from the Galileo archives.<sup>889</sup>

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<sup>888</sup> June 22, 1633 Sentence, published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 287-93: “In execution of this decree, on the following day at the palace of and in the presence of the Cardinal Bellarmine, after being gently admonished by the said Lord Cardinal, the command was enjoined upon you by the Father Commissary of the Holy Office of that time, before a notary and witnesses, that you were altogether to abandon the said false opinion and not in the future to hold or defend or teach it in any way whatsoever, neither verbally nor in writing; and upon your promising to obey, you were dismissed.”

<sup>889</sup> Apologists for the Church's role in the Galileo Affair speculate, without any evidence, that the custodians *may* have filed the original of the Segizzi injunction, with the signatures of the notary and witnesses, in the *Libri extensorum*, the registry of decrees, rather than the *Decreta*, the decrees themselves. Therefore, the custodians may have lost the original when the *Libri extensorum* disappeared during the

Second, *the Holy Office never authenticated the Segizzi injunction*. The Holy Office provided no evidence, and none appears anywhere in the record, that the Segizzi injunction was authentic or actually existed. The original Segizzi injunction would have contained a notary's seal and the signatures of witnesses.<sup>890</sup> The document used in the 1633 trial was unsigned, unwitnessed, and unnotarized. There is not even a single *reference* to the Segizzi injunction anywhere in the records of the Holy Office until the Special Commission “discovered” it in 1632.

Third, *the Segizzi injunction was illegal*. The Pope's order required Cardinal Bellarmine to deliver his warning to Galileo in the form of an “evangelical admonition,” a *denunciatio evangelica*. This required a two-step procedure. The first step of this format was a charitable admonition, or *caritativa monitio*. The law required that Segizzi conduct the *caritativa monitio* in secret in order to be legally valid.<sup>891</sup> The Segizzi injunction relates, however, that there were at least four others besides Galileo and Cardinal Bellarmine in the room during the *caritativa monitio*.<sup>892</sup> This circumstance invalidates the entire *denunciatio evangelica* procedure, including Segizzi's injunction.

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transport of the Holy Office archives to Paris under Napoleon. See Annibale Fantoli, “The Disputed Injunction and Its Role in Galileo's Trial,” *The Church and Galileo*, ed. Ernan McMullin (South Bend, IN: U Notre Dame P, 2005) 117-149, 145 n.15.

<sup>890</sup> Guido Morpurgo-Taliabue, *I processi di Galileo e l'epistomologia* (Rome: Armando, 1981) 20, 20 n. 14; Stillman Drake, *Galileo at Work: His Scientific Biography* (Chicago: U Chicago P, 1978) 253-54; Annibale Fantoli, “The Disputed Injunction and Its Role in Galileo's Trial,” *The Church and Galileo*, ed. Ernan McMullin (South Bend, IN: U Notre Dame P, 2005) 117-149, 121.

<sup>891</sup> Francesco Beretta, *Galilée devant le Tribunal de l'Inquisition* (Fribourg: Université de Fribourg, 1998) 152 ff.; Annibale Fantoli, “The Disputed Injunction and Its Role in Galileo's Trial,” *The Church and Galileo*, ed. Ernan McMullin (South Bend, IN: U Notre Dame P, 2005) 117-149, 123.

<sup>892</sup> In addition to recording the presence of Galileo and Cardinal Bellarmine, the Segizzi injunction recites that Father Michelangelo Segizzi was present as the Father Commissary of the Holy Office, as well as two witnesses, the Reverend Badino Nores of Nicosia in the kingdom of Cyprus and Agostino Mongardo from the Abbey of Rose in the diocese of Montepulciano. The recording notary was also present. February 26, 1616, Special Injunction of the Father Commissary of the Holy Office to Galileo, published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 147-148.

Fourth, *Cardinal Bellarmine's certificate contradicts the Segizzi injunction*. The Holy Office's final report to the Pope concedes the authenticity of the Bellarmine certificate.<sup>893</sup> The account of events in Cardinal Bellarmine's certificate directly contradicts the terms of the Segizzi injunction. Bellarmine's certificate never mentions the Segizzi injunction, and it does not even indicate that Segizzi was present at the meeting with Galileo. The injunctive language in the two documents is irreconcilable as well.<sup>894</sup>

Fifth, *the Segizzi injunction violated the Pope's order of February 25, 1616*.<sup>895</sup> The Pope's order instructed the Father Commissary to issue his injunction against Galileo *only if*

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<sup>893</sup> June, 1633, Final Report to the Pope published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 281-86, 284: "as is evident from the certificate written for him in the cardinal's own hand."

<sup>894</sup> May 26, 1616, Certificate of Cardinal Bellarmine, published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 153. Cardinal Bellarmine gently warned Galileo that "Copernicanism cannot be defended or held." The Segizzi injunction, on the other hand, "orders and enjoins" Galileo to "abandon completely the above-mentioned opinion that the sun stands still at the center of the world and the earth moves, and henceforth not to hold, teach, or defend it in any way whatever, either orally or in writing; otherwise the Holy Office would start proceedings against him." February 26, 1616, Special Injunction of the Father Commissary of the Holy Office to Galileo, published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 147-48.

<sup>895</sup> The injunction recites that Segizzi issued the injunction "in the name of His Holiness the Pope and the whole Congregation of the Holy Office" on February 26, 1616. February 26, 1616, Special Injunction of the Father Commissary of the Holy Office to Galileo, published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 147-148. This is the next day following the Pope's order as recorded in the minutes of the Holy Office. February 25, 1616, Minutes of the Congregation of the Holy Office published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 147.

Galileo refused to acquiesce to Cardinal Bellarmine's warning.<sup>896</sup> The minutes of the Holy Office record that Galileo acquiesced on March 3, 1616.<sup>897</sup>

Sixth, *the Segizzi injunction was "discovered" under suspicious circumstances.* The Segizzi injunction was first "discovered" by Pope Urban VIII's Special Commission in 1632.<sup>898</sup> The Special Commission had the greatest motive to create a subterfuge.<sup>899</sup> Its three members were antipathetic to Galileo, and each found that Galileo's violation of the Segizzi injunction

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<sup>896</sup> February 25, 1616, Minutes of the Congregation of the Holy Office published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 147. The minutes reflect that the Pope ordered Cardinal Bellarmine "to call Galileo before himself and warn him to abandon these opinions; and if he should refuse to obey, the Father Commissary, in the presence of a notary and witnesses, is to issue him an injunction to abstain completely from teaching or defending this doctrine and opinion or from discussing it; and further, if he should not acquiesce, he is to be imprisoned." [Emphasis added].

<sup>897</sup> March 3, 1616, Minutes of the Congregation of the Holy Office published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 148. The Minutes of March 3, 1616 record that Galileo "acquiesced when warned of the order by the Holy Congregation to *abandon the opinion* which he held till then, to the effect that the sun stands still at the center of the spheres but that the Earth is in motion." [Emphasis added].

<sup>898</sup> Jules Speller, *Galileo's Inquisition Trial Revisited* (Frankfurt: Lang, 2008) 176; Annibale Fantoli, "The Disputed Injunction and Its Role in Galileo's Trial," *The Church and Galileo*, ed. Ernan McMullin (South Bend, IN: U Notre Dame P, 2005) 117-149, 118. See February 26, 1616, Special Injunction of the Father Commissary of the Holy Office to Galileo, published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 147-48. The first reference to this Segizzi injunction appears in the September, 1632, Special Commission Report On Galileo's Dialogue, published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 218-22: "In 1616 the author had from the Holy Office the injunction that 'he abandon completely the above-mentioned opinion that the sun is the center of the world and the Earth moves, nor henceforth hold, teach, or defend it in any way whatever, orally or in writing; otherwise the Holy Office would start proceedings against him. He acquiesced in this injunction and promised to obey.' "

<sup>899</sup> The decree condemning Galileo bases its judgment almost exclusively on Galileo's failure to comply with the terms of the Segizzi injunction. June 22, 1633 Sentence, published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 287-93: "[A]fter being informed and warned in a friendly way by the same Lord Cardinal, you were given an injunction by the then Father Commissary of the Holy Office (404) in the presence of a notary and witnesses to the effect that you must completely abandon the said false opinion, and that in the future you could neither hold, nor defend, nor teach it in any way whatever, either orally or in writing; having promised to obey, you were dismissed." Because of the importance of the Segizzi injunction to the 1633 conviction of Galileo, apologists for the Church's role in the Galileo Affair are compelled to defend the Segizzi injunction as factual and judicially valid. Apologists have advanced imaginative scenarios to explain the shortcomings listed above. These scenarios are wholly speculative, however, and unsupported by any evidence. For a favorable discussion of some of these scenarios by an author admittedly inclined to accept them, see Annibale Fantoli, "The Disputed Injunction and Its Role in Galileo's Trial," *The Church and Galileo*, ed. Ernan McMullin (South Bend, IN: U Notre Dame P, 2005) 117-149, 120-123.

rendered Galileo's prosecution for heresy “unavoidable.”<sup>900</sup> The Special Commission also had the greatest opportunity to create a subterfuge, since the injunction was “discovered” in the Holy Office's own records.

In sum, the only explanation that accounts for all the facts in the Galileo Affair is that the Segizzi injunction was a politically motivated subterfuge. Any impartial tribunal would have excluded the Segizzi injunction for three reasons.<sup>901</sup> The first is the inability of Galileo's inquisitors to provide *any* evidence of its authenticity. The second is the inconsistency of the Segizzi injunction with the entirety of all other Holy Office records of the Galileo Affair. The third is the weight and preponderance of the undisputed evidence presented by Galileo that the Segizzi injunction was not authentic.<sup>902</sup>

#### **B. The Holy Office's Legal System Satisfies Hart's Conditions for a Valid Legal System**

Despite its reliance on torture, coerced confessions, and subterfuge, the legal system utilized by the Congregation of the Holy Office satisfies legal positivism's requirements for a valid legal system. As explained in Chapter II, Hart utilizes the external<sup>903</sup> and internal points of

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<sup>900</sup> September, 1632, Special Commission Report on the Dialogue, published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 218-22, 222.

<sup>901</sup> The Segizzi injunction would be inadmissible under American law, for example, for a number of reasons. The Segizzi injunction violates the “best evidence” rule, which requires the original document for admissibility. The Segizzi injunction does not constitute a court record because it lacks the necessary formal execution and notarization. The Segizzi injunction is hearsay since it consists of an out of court declaration offered for its truth. It is thus inadmissible for any purpose because it fails to satisfy any recognized exception to the hearsay rule. Lastly, the absence of the original in the records of the Holy Office is admissible as evidence that the Segizzi injunction *never existed*.

<sup>902</sup> The claim that the Segizzi injunction was authentic contradicts (1) the order of Pope Paul V as recorded in the minutes of the Holy Office on February 25, 1616, (2) Bellarmine's report to the Holy Office, recorded in the minutes of the Holy Office on March 3, 1616, (3) Bellarmine's certificate of May 26, 1616, the authenticity of which is admitted by the Holy Office, and (4) Galileo's uncontradicted testimony in 1633, which Galileo refused to change, even under threat of torture.

<sup>903</sup> The *external point of view* is the view of a person who feels no obligation that he “should” follow the law. H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 56. The external point of view is present in people engaging in mere “social habits” and “group habits.”

view<sup>904</sup> to explain the two conditions required for the existence of a valid legal system. The first condition is that private citizens generally obey the primary rules of obligation.<sup>905</sup> It is sufficient that each member of the population obeys the primary rules “for his part only” and “from any motive whatsoever.” In Hart’s terminology, it is *sufficient* that *citizens* take an *external* point of view toward *primary* rules.<sup>906</sup> Since those subject to the proceedings of the Holy Office generally obeyed the primary rules of obligation, the Holy Office’s legal system satisfied Hart’s first condition for a valid legal system.

The second condition for the existence of a valid legal system under Hart’s positivism is that public officials adopt the rule of recognition as their “public standard of official behavior.”<sup>907</sup> Officials must feel themselves obligated to adopt and abide by the rule of recognition, and they must censure those public officials who fail to do so. In Hart’s terms, it is a minimum *necessary* condition that *officials* take the *internal* point of view toward *secondary* rules.<sup>908</sup> The legal system of the Holy Office satisfies Hart’s second condition for legal validity. Church officials clearly felt themselves obligated to adopt and abide by the applicable rule of recognition, and severely sanctioned any officials who refused to do so.

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<sup>904</sup> The *internal point of view*, on the other hand, is the view of a person who feels obligated to follow the law. H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 56-57.

<sup>905</sup> A *primary rule* is a rule that imposes an obligation or a duty. “[P]rimary rules are concerned with the actions that individuals must or must not do.” Examples of primary rules include torts and criminal laws. H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 91.

<sup>906</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 116.

<sup>907</sup> The rule of recognition provides “a rule for conclusive identification of the primary rules of obligation,” and it serves as Hart’s ultimate criterion for the validity of law. H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 94-95, 105. A rule is legally valid, and therefore enforceable, if it conforms to the requirements set forth in the rule of recognition. *Id.* at 103.

<sup>908</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 117.



### C. The Galileo Affair Confirms the Necessity of Procedural Due Process Protections

Since legal validity determines the enforceability of law, the standard for legal validity presents a fundamental issue for any legal system. The experience of the English Revolution of 1603-1701 established the necessity of autonomy and consent in determining legal validity. The trial of Socrates, however, revealed that autonomy and consent are insufficient by themselves to provide an acceptable standard of legal validity. The trial of Socrates established that a principle of reason incorporating procedural due process is also required to protect against (1) the tyranny of the majority and (2) the conviction and punishment of the innocent.

The Galileo Affair, like the trial of Socrates, confirms the necessity of procedural due process protections to protect the innocent from conviction. In addition to the procedural protections discussed in the trial of Socrates in Chapter III, the experience of the Galileo Affair demonstrates that defendants must not be compelled to testify against themselves.<sup>909</sup> Any confessions must be voluntary, and the use of physical or psychological coercion in obtaining a confession requires its exclusion from evidence.<sup>910</sup>

Defendants must receive speedy and public trials.<sup>911</sup> The court must not deny bail unreasonably. The court must presume the innocence of the defendant. Evidence is required to convict the defendant. Suspicion alone are not sufficient.<sup>912</sup>

The defendant must receive the right to confront and cross-examine the witnesses against him.<sup>913</sup> The defendant must enable the defendant to compel the attendance of witnesses to testify on his behalf.<sup>914</sup> The court must not subject the defendant to double jeopardy for the

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<sup>909</sup> U.S. CONST. amend. V.

<sup>910</sup> *Bram v. United States*, 168 U.S. 532 (1897).

<sup>911</sup> U.S. CONST. amend. VI.

<sup>912</sup> U.S. CONST. amend. V.

<sup>913</sup> U.S. CONST. amend. VI.

<sup>914</sup> U.S. CONST. amend. VI.

same offense.<sup>915</sup> Evidentiary rules must protect against the admission of fraudulent evidence, and the court must not impose any punishment prior to conviction.<sup>916</sup>

The Congregation of the Holy Office denied all these protections to Galileo. Consequently, Galileo was condemned despite his innocence of the charges against him. Nevertheless, even when combined with the principles of autonomy and consent, procedural due process protections are still insufficient to ensure that legal systems treat their subjects as ends in themselves.

The discussion of the Soviet legal system that follows illustrates the need for *substantive* as well as *procedural* due process. The experience of the Soviet legal system also demonstrates the necessity that legal systems recognize their subjects' status as rational creatures with free will.

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<sup>915</sup> U.S. CONST. amend. V.

<sup>916</sup> U.S. CONST. amend. V.

## CHAPTER V

### LEON TROTSKY AND THE MOSCOW TRIALS

“A club is a primitive weapon, a rifle is a more efficient one, the most efficient is the court. For us there is no difference between a court of law and summary justice. Our judge is above all a politician, a worker in the political field, and therefore he must know what the government wants and guide his work accordingly.”

**Soviet Commissar of Justice N.V. Krylenko, 1923.**

The three “Moscow Trials” of 1936,<sup>917</sup> 1937,<sup>918</sup> and 1938,<sup>919</sup> prosecuted under the Soviet Criminal Code of 1934, were part of Stalin's “Great Terror” from 1936-1939. The Soviet legal experience demonstrates the effectiveness of law as an instrument of terror if laws are unrestrained by the principles of autonomy, consent, and reason.

The Soviet legal experience also demonstrates two final requirements for a viable standard of legal validity. The first is the requirement that *legal systems must recognize and treat their subjects as rational beings with a free will*. The second is the requirement of *substantive due process*. Laws must provide reliable guideposts by which people, as rational beings with free wills, may orient their own behavior to achieve a society based on ordered liberty.

The Military Collegium of the Supreme Court of the U.S.S.R., a panel of three military judges, convicted the defendants in the Moscow Trials of conspiring to engage in acts of espionage and terrorism under the direction of Leon Trotsky. The purported goals of these conspiracies included the liquidation of the Soviet leadership to obtain power; the destruction of the Soviet economy through sabotage; the invasion, defeat, and dismemberment of the Soviet Union by foreign powers; and the reinstatement of capitalism and the power of the bourgeoisie.

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<sup>917</sup> People's Commissariat of Justice of the USSR, *Report of Court Proceedings in the Case of the Trotskyite-Zinovievite Terrorist Centre Heard Before the Military Collegium of the Supreme Court of the U.S.S.R., Moscow, August 19-24, 1936* (People's Commissariat of Justice of the USSR: Moscow, 1936).

<sup>918</sup> People's Commissariat of Justice of the USSR, *Report of Court Proceedings in the Case of the Anti-Soviet Trotskyite Centre Heard Before the Military Collegium of the Supreme Court of the U.S.S.R., Moscow, January 23-30, 1937* (People's Commissariat of Justice of the USSR: Moscow, 1937).

<sup>919</sup> People's Commissariat of Justice of the USSR, *Report of Court Proceedings in the Case of the Anti-Soviet “Bloc of Rights and Trotskyites,” heard before the Military Collegium of the Supreme Court of the U.S.S.R., Moscow, March 2-13, 1938* (People's Commissariat of Justice of the USSR: Moscow, 1938).

Stalin carefully orchestrated the three Moscow Trials to purge the Soviet political leadership of any actual or potential opponents to his consolidation of power. Stalin first arranged the assassination of his most potent political rival, Sergei Kirov, on December 1, 1934. Stalin then used the assassination of Kirov to justify amendments to the Criminal Code that “simplified” criminal prosecutions, such as the denial of the right to counsel, the denial of any right to appeal, and immediate execution of death sentences. Once he had amended the Criminal Code, Stalin purged his political opponents in the Moscow Trials by falsely accusing them of conspiring with Trotsky to kill Kirov and commit other “counterrevolutionary” crimes.

The defendants in the three Moscow Trials included most of the “Old Bolsheviks,” the architects of the “great socialist experiment.”<sup>920</sup> The Military Collegium convicted each of the fifty-four defendants, most on the strength of confessions obtained under torture.<sup>921</sup> Forty-seven defendants were shot, and the remaining seven received long prison terms.

The Military Collegium convicted Trotsky and his son Lev Sedov *in absentia* in the 1936 and 1937 trials. Both had been exiles since 1928. Sedov died under suspicious circumstances after an appendectomy in Paris on February 16, 1938. Trotsky died in Mexico on August 21, 1940, after Soviet agent Ramon Mercader plunged an ice ax into his skull.

The Moscow Trials were one facet of Stalin’s “Great Terror,” a judicial reign of terror

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<sup>920</sup> Sidney Hook, “Memories of the Moscow Trials,” *Commentary* 77(3) (1984): 57-63, 58. The balance of the leadership was “silently eliminated” without coming to trial by being imprisoned, deported, or killed. Leites, Nathan and Elsa Bernaut, *Ritual of Liquidation: The Case of the Moscow Trials* (Glencoe, IL: Free, 1954) 13.

<sup>921</sup> Nikita S. Khrushchev, *The Crimes of the Stalin Era: Special Report to the 20th Congress of the Communist Party of the Soviet Union*, ed. Boris I. Nicolaevsky (New York: New Leader, 1962) 20, 27. “It became apparent that many Party, Soviet and economic activists who were branded in 1937-1938 as enemies were actually never enemies, spies, wreckers, etc., but were always honest Communists; they were only so stigmatized, and often, no longer able to bear barbaric tortures, they charged themselves with all kinds of grave and unlikely crimes.” *Id.* at 20. “Now, when the [1937-1938] cases of some of these so-called ‘spies’ and ‘saboteurs’ were examined, it was found that all their cases were fabricated. Confessions of guilt of many arrested and charged with enemy activity were gained with the help of cruel and inhuman tortures.” *Id.* at 22.

instigated by Stalin across Russia from 1936 through 1939. Utilizing data released in 1987-1989 during Gorbachev's *glasnost*, historian Robert Conquest estimates that Stalin's agents arrested 8 million Russians during the Great Terror. Stalin's agents executed an estimated 1.5 million of these. Approximately 2 million died in camps, 600,000 to 700,000 by execution. At the end of the Terror, approximately 1 million remained in prisons, and the camp population had increased from 5 million to 8 million.<sup>922</sup>

According to Khrushchev, of the 139 candidates and members of the Party's Central Committee elected in 1934, Stalin had 98 arrested and shot by 1938. Of the 1,966 delegates to the 1934 Party Congress, Stalin had 1,098 arrested on charges of counterrevolutionary crimes.<sup>923</sup> Stalin also targeted the military leadership during the Great Terror. Stalin purged 3 of the 5 Marshals; 13 of the 15 Army Commanders; 8 of the 9 Fleet Admirals and Admirals Grade I; 50 of the 57 Corps Commanders; 154 of the 186 Divisional Commanders; all 16 of the Army Commissars; 25 of the 28 Corps Commissars; 58 of the 64 Divisional Commissars; all 11 of the Vice Commissars of Defense; and 98 out of 108 members of the Supreme Military Soviet.<sup>924</sup>

Convicting and executing such large numbers required a streamlined legal system operating with assembly line efficiency.<sup>925</sup> Under the system of "socialist legality," political considerations played the decisive role in deciding questions of guilt, innocence and punishment. The state did not punish criminals for committing criminal acts but rather for their "social dangerousness." Coerced confessions replaced evidence, and the Criminal Code authorized the

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<sup>922</sup> Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 484-86. According to Conquest, the Soviet government estimates that a total number of 40 million Russians died under Stalin's regime, not counting those who died during WW II. Approximately half died during the peasant terror of 1929 to 1933, and the other half from 1937 to 1953.

<sup>923</sup> Nikita S. Khrushchev, *The Crimes of the Stalin Era: Special Report to the 20th Congress of the Communist Party of the Soviet Union*, ed. Boris I. Nicolaevsky (New York: New Leader, 1962) 20-21.

<sup>924</sup> Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 450-51.

<sup>925</sup> Paul Gregory, "Simplified Methods and Efficiency: Stalin's Terror Managers," *J. of Comparative Economics* 37 (2) (2009) 207-16.

intentional punishment of innocent parties.<sup>926</sup>

“Troikas” composed of a Chekist officer, a Party representative, and a representative of the prosecutor's office often replaced the courts in processing criminal allegations.<sup>927</sup> Troikas operated in secret, conducted no hearings, held no trials, and rarely saw their victims face to face. From August 1937 to November 1938, troikas averaged more than 1500 death sentences daily.<sup>928</sup> Nevertheless, despite its terror, the Soviet legal system satisfied all of legal positivism's requirements for a valid legal system.

## **I. The Soviet Legal System**

### **A. Revolutionary Violence and Dictatorship**

Lenin viewed the proletariat as “unconscious” and thus unable, on its own, to progress beyond trade unionism.<sup>929</sup> In 1917 Lenin wrote that the Party must be “the teacher, the guide, the leader” of the workers.<sup>930</sup> Lenin formed the Communist Party to function as a disciplined group of elite revolutionaries who would lead the “unconscious” masses to power. A party dictatorship

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<sup>926</sup> Vladimir Gsovski, “Reform of Criminal Law in the Soviet Union,” *Social Problems* 7 (4) (1960) 315-28, 321.

<sup>927</sup> Vladimir Gsovski, “Reform of Criminal Law in the Soviet Union,” *Social Problems* 7 (4) (1960) 315-28; Paul Gregory, “Simplified Methods and Efficiency: Stalin’s Terror Managers,” *J. of Comparative Economics* 37 (2) (2009) 207-16, 211-212; Richard Pipes, *Russia under the Bolshevik Regime* (New York: Vintage, 1994) 401-03; and Doriane Lambelet, “The Contradiction between Soviet and American Human Rights Doctrine: Reconciliation through Perestroika and Pragmatism,” *Boston U. Intl. L. J.* 7 (1989): 61-83, 61-62.

<sup>928</sup> Paul Gregory, “Simplified Methods and Efficiency: Stalin’s Terror Managers,” *J. of Comparative Economics* 37 (2) (2009) 207-16, 211-212.

<sup>929</sup> V.I. Lenin, *The State and Revolution* (Whitefish, MT: Kessinger, 2004) 22: “As against this, the opportunism which now holds sway trains the membership of the workers' party to be the representatives of the better-paid workers, who lose touch with the rank and file, 'get along' fairly well under capitalism, and sell their birthright for a mess of pottage, i.e., renounce their role of revolutionary leaders of the people against the bourgeoisie.” *Accord*, Harold J. Berman, *Justice in the USSR: An Interpretation of Soviet Law* (Cambridge, Harvard UP, 1978) 24.

<sup>930</sup> V.I. Lenin, *The State and Revolution* (Whitefish, MT: Kessinger, 2004) 22: “By educating the workers' party, Marxism educates the vanguard of the proletariat which is capable of assuming power *and of leading the whole people* to Socialism, of directing and organizing the new order, of being the teacher, the guide, the leader of all the toilers and exploited in the task of building up their social life without the bourgeoisie and against the bourgeoisie.” [Emphasis in original].

would temporarily rule in the name of the proletariat. In time, the party dictatorship would transform into a classless socialist society.<sup>931</sup>

Communism did not come to Russia through popular uprising or popular vote.<sup>932</sup> A small minority cloaked in democratic slogans imposed Communism on Russia through a coup d'état.<sup>933</sup> Although the Bolsheviks claimed to represent industrial workers, industrial workers constituted only 1 to 2% of Russia's population. On the eve of Lenin's November 7, 1917 coup, only 5.3% of the industrial workers were members of the Bolshevik party.<sup>934</sup> Lenin thus recognized, both theoretically and practically, that the nature of the Bolshevik takeover meant that the new regime must rule through dictatorship.

Lenin defined dictatorship as “power that is limited by nothing, by no laws, that is

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<sup>931</sup> Harold J. Berman, *Justice in the USSR: An Interpretation of Soviet Law* (Cambridge, Harvard UP, 1978) 24. As Lenin wrote in 1917: “Furthermore, during the *transition* from capitalism to Communism suppression is *still* necessary; but it is now the suppression of the exploiting minority by the exploited majority. A special apparatus, a special machine for suppression, the 'state,' is *still* necessary, but this is now a transitional state; it is no longer a state in the proper sense of the word; for the suppression of the minority of exploiters by the majority of the wage slaves of *yesterday* is comparatively so easy, simple and natural a task that it will entail far less bloodshed than the suppression of the risings of slaves, serfs, or wage laborers and will cost mankind far less.” V.I. Lenin, *The State and Revolution* (Whitefish, MT: Kessinger, 2004) 76-77.

<sup>932</sup> Robert Conquest describes the failure of the Bolsheviks under Lenin to gain popular support as follows: “It is clear from reports of the meeting of the Central Committee nine days before the October Revolution in 1917 that the idea of the rising was 'not popular,' that 'the masses received our call with bewilderment.' Even the reports from most of the garrisons were tepid. The seizure of power was, in fact, an almost purely military operation, carried out by a small number of Red Guards, only partly from the factories, and a rather large group of Bolshevized soldiery. The working masses were neutral. Then, and in the Civil War that followed, by daring and discipline a few thousand comrades imposed themselves on Russia, against the various representatives of all political and social trends, and with the certain prospect of joint annihilation if they failed.” Conquest estimates the size of the central core of the Party in October 1917 as 5,000 to 10,000. Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 4-5.

<sup>933</sup> The most prominent slogan was “Bread, Land, Peace and All Power to the Soviets.” Richard Pipes, *Communism: A Brief History*, (London: Weidenfeld and Nicolson, 2001), 38: “Lenin's coup took place on November 7 when pro-Bolshevik units took over all the strategic points in the capital without firing a shot. Lenin later said that taking power in Russia was as easy as 'lifting a feather.' The reason was that he had cleverly camouflaged the seizure of power by himself and his party as the transfer of 'all power to the Soviets,' which slogan promised grassroots democracy rather than dictatorship.” *Id.*

<sup>934</sup> Richard Pipes, *Communism: A Brief History*, (London: Weidenfeld and Nicolson, 2001), 39.

restrained by absolutely no rules, that rests directly on coercion.”<sup>935</sup> Centralized and organized violence was necessary, according to Lenin, to “crush the exploiters.” Centralized and organized violence was *also* necessary, Lenin wrote, to lead the masses in the work of organizing the socialist economy.<sup>936</sup> Lenin insisted that “revolutionary violence” was essential “against the faltering and unrestrained elements of the toiling masses themselves.”<sup>937</sup>

Lenin's study of history persuaded him that past social revolutions had failed by stopping halfway, thus allowing their class enemies to survive and regroup.<sup>938</sup> To avoid repeating this mistake, Lenin resorted to terror to destroy his opponents and control the rest of the population.<sup>939</sup> “Total” and “merciless” violence was required to achieve the goal of altering human nature to create the “new man” and his new society.<sup>940</sup>

The Soviets converted Russian legal institutions into organs of systematic terror. In

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<sup>935</sup> V.I. Lenin, *Polnoe Sobranie Sochinenii* (*Complete Collected Works*), 5th ed., vol. 41 (Moscow: Institut Marksizma-Leninizma, 1958-65) 383.

<sup>936</sup> V.I. Lenin, *The State and Revolution* (Whitefish, MT: Kessinger, 2004) 22: “The proletariat needs state Power, the centralized organization of force, the organization of violence, both to crush the resistance of the exploiters and to *lead* the enormous mass of the population-the peasantry, the petty bourgeoisie, the semi-proletarians-in the work of organizing socialist economy.”

<sup>937</sup> Leonard Schapiro, *The Communist Party of the Soviet Union* (London: Vintage, 1960) 207.

<sup>938</sup> In a 1908 essay, “Lessons of the Commune,” Lenin praised the 1871 Paris uprising after the French defeat in the Franco-Prussian War as the first proletariat revolution. Lenin argued, however, that the Paris Commune's “excessive generosity” was a cardinal weakness. “It should have exterminated its enemies,” wrote Lenin, instead of trying “to exert moral influence on them.” V.I. Lenin, *Polnoe Sobranie Sochinenii* (*Complete Collected Works*), 5th ed., vol. 16 (Moscow: Institut Marksizma-Leninizma, 1958-65) 452, quoted in Richard Pipes, *The Russian Revolution* (New York: Knopf, 1990) 790.

<sup>939</sup> Richard Pipes, *Communism: A Brief History*, (London: Weidenfeld and Nicolson, 2001) 39.

<sup>940</sup> Richard Pipes, “The Fall of the Soviet Union,” *The Collapse of Communism*, ed. Lee Edwards (Stanford: Stanford UP, 2000) 45. Marx wrote the following regarding the steps necessary to achieve the new society: “The present generation resembles the Jews who Moses led through the wilderness. It must not only conquer a New World, it must also perish in order to make room for the people who are fit for a New World.” Karl Marx, *The Class Struggles in France: 1848-1850* (New York: International, 1964) 14. Trotsky described the “new man” that would emerge, god-like, under Communism as follows: “Man will become immeasurably stronger, wiser, and subtler; his body will become more harmonized, his movements more rhythmic, his voice more musical. The forms of life will become dynamically dramatic. The average human type will rise to the heights of an Aristotle, a Goethe, or a Marx. And above this ridge new peaks will rise.” Leon Trotsky, *Literature and Revolution* (Chicago: Haymarket, 2005) 206-07.



Lenin's words, "the courts shall not do away with terrorism; to promise such a thing would mean to cheat ourselves or other people."<sup>941</sup> Although Lenin believed that the necessary brutalities should be carried out "in the briefest possible time because the masses will not tolerate the prolonged application of brutality,"<sup>942</sup> the Soviet legal system incorporated terror as a permanent apparatus of the Soviet government.

### **B. Lenin Destroys the Traditional Legal Institutions (November 22, 1917)**

The first step in the introduction of mass terror to Soviet Russia was the elimination of all legal restraints on power. Lenin was a lawyer and viewed the law and the courts as tools utilized by the ruling class to enforce its interests.<sup>943</sup> He believed that one of the cardinal mistakes of the Paris Commune was its failure to abolish the French legal system, and he did not intend to repeat that mistake.<sup>944</sup>

On November 22, 1917, Lenin issued a decree abolishing the professions associated with the judicial system, including the legal profession, the Procurator (the Russian equivalent of the Attorney General), and most justices of the peace.<sup>945</sup> Lenin's decree provided that pre-existing laws were enforceable only to the degree that they did "not contradict the revolutionary conscience and the revolutionary sense of legality." The 1917 decree also dissolved almost all

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<sup>941</sup> Vladimir Gsovski, "Reform of Criminal Law in the Soviet Union," *Social Problems* 7 (4) (1960) 315-28, 316.

<sup>942</sup> Richard Pipes, ed., *The Unknown Lenin: From the Secret Archives* (New Haven: Yale UP, 1996) 153. Lenin wrote these words in 1922 in a secret communication to the Politburo in which he authorized the mass executions of Orthodox clergymen.

<sup>943</sup> Harold J. Berman, *Justice in the USSR: An Interpretation of Soviet Law* (Cambridge, Harvard UP, 1978) 25. Lenin studied law at the University of St. Petersburg and received a "first" in the state law examination of 1891. He practiced law in the city of Samara for approximately a year before becoming a full-time revolutionary.

<sup>944</sup> Richard Pipes, *The Russian Revolution* (New York: Knopf, 1990) 796.

<sup>945</sup> Richard Pipes, *The Russian Revolution* (New York: Knopf, 1990) 797. The practice of law was at first opened to "all who enjoy civil rights." The government soon rejected this arrangement, however, in favor of establishing a body of legal representatives appointed by the local government organs on a salary basis. The state treasury collected the clients' fees. Harold J. Berman, *Justice in the USSR: An Interpretation of Soviet Law* (Cambridge, Harvard UP, 1978) 31.

the existing courts, including the Senate, the highest court of appeals.<sup>946</sup>

Only the *mestnye sudy* (“local courts”) remained temporarily intact, and their jurisdiction was limited to minor offenses against private citizens.<sup>947</sup> The decrees of the political rulers in the Soviet government would guide verdicts, not pre-existing laws. If these were lacking, then an undefined *sotsialisticheskoe pravosoznanie* (“socialist sense of justice”) would guide verdicts.<sup>948</sup> In March 1918, *narodnye sudy* (“People’s Courts”) replaced the remaining *mestnye sudy* (“local courts”). These courts were given jurisdiction of all citizen-on-citizen crimes.

### C. Lenin Establishes the Revolutionary Tribunals (November 22, 1917)

In keeping with the traditional Russian approach of treating crimes against the state differently from crimes against private citizens, Lenin’s November 22, 1917, decree also established a new type of court, the Revolutionary Tribunal.<sup>949</sup> Modeled on a similar institution of the French Revolution, the Revolutionary Tribunal was responsible for prosecuting “counterrevolutionary crimes,” which included economic crimes and sabotage.<sup>950</sup> Judges on these Revolutionary Tribunals usually had no legal training. The only qualification for service was the ability to read and write.<sup>951</sup>

On December 21, 1917, the Commissariat of Justice ordered that the Revolutionary Tribunal set its penalties according to the circumstances of the case and the dictates of

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<sup>946</sup> An English translation of this “Decree No. 1” appears in Samuel Kuchеров, *The Organs of Soviet Administration of Justice: Their History and Operation* (Leiden: Brill, 1970) 23-25.

<sup>947</sup> Richard Pipes, *The Russian Revolution* (New York: Knopf, 1990) 797.

<sup>948</sup> Richard Pipes, *The Russian Revolution* (New York: Knopf, 1990) 798. Accord, Vladimir Gsovski, “Reform of Criminal Law in the Soviet Union,” *Social Problems* 7 (4) (1960) 315-28, 316.

<sup>949</sup> Harold J. Berman, *Justice in the USSR: An Interpretation of Soviet Law* (Cambridge, Harvard UP, 1978) 31.

<sup>950</sup> Richard Pipes, *The Russian Revolution* (New York: Knopf, 1990) 798. Accord, Vladimir Gsovski, “Reform of Criminal Law in the Soviet Union,” *Social Problems* 7 (4) (1960) 315-28, 316.

<sup>951</sup> Richard Pipes, *The Russian Revolution* (New York: Knopf, 1990) 799.

“revolutionary conscience.”<sup>952</sup> “Revolutionary conscience” was undefined. Those living under Bolshevik rule now lived under an extraordinary legal system. Although courts for ordinary crimes and courts for crimes against the state nominally existed, the courts had no laws to guide them. Amateur judges sentenced citizens for violating unwritten crimes. Presiding judges defined offenses and set penalties according to their individual “revolutionary conscience.”

Since 1864, Russia had adopted the Western legal principles of *nullum crimen sine lege* (no crime without a law) and *nulla poena sine lege* (no punishment without law). Russia now abandoned these principles. Russia under the Bolsheviks was literally a society without law.<sup>953</sup>

#### **D. Russian Courts of the “Red Terror” (1918)**

The “Red Terror” was a massive repression launched after the attempted assassination of Lenin on August 30, 1918.<sup>954</sup> *Izvestiya* officially announced The “Red Terror” on September 3, 1918 in an article entitled “Appeal to the Working Class.” The “Appeal” called for the workers to “crush the hydra of counterrevolution with massive terror! ... Anyone who dares to spread the slightest rumor against the Soviet regime will be arrested immediately and sent to concentration camp.”<sup>955</sup>

A ruling in November 1918 prohibited judges of the *narodyne sudy* (“People's Courts”) from applying any laws enacted before the revolution of October 1917.<sup>956</sup> The ruling also freed

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<sup>952</sup> Richard Pipes, *The Russian Revolution* (New York: Knopf, 1990) 798.

<sup>953</sup> Richard Pipes, *The Russian Revolution* (New York: Knopf, 1990) 799.

<sup>954</sup> The attempt occurred after Lenin gave a speech at the Grain Commodity Exchange in Moscow. Lenin had closed the speech with the words, “We shall die or triumph!” The attempted assassin was Fannie Efimovna Kaplan, the daughter of a Ukrainian schoolteacher and a former anarchist and bomb maker. Kaplan shot Lenin twice, once in the arm and once in the juncture of the jaw and neck. The bullets had cross incisions on their tips and traces of curare, a South American poison used on arrows. Kaplan testified, “I shot Lenin because I believe him to be a traitor. By living long, he postpones the idea of socialism for decades to come.” Richard Pipes, *The Russian Revolution* (New York: Knopf, 1990) 806-11.

<sup>955</sup> Stéphane Courtois, ed. *The Black Book of Communism* (Cambridge: Harvard UP, 1999) 73-74.

<sup>956</sup> Richard Pipes, *The Russian Revolution* (New York: Knopf, 1990) 797-98. *Accord*, Vladimir Gsovski, “Reform of Criminal Law in the Soviet Union,” *Social Problems* 7 (4) (1960) 315-28, 316.

the judges of the *narodnye sudy* from observing any formal rules of procedure or evidence.<sup>957</sup> The ruling lastly instructed the judges to determine guilt, not based on evidence or law, but on their subjective impressions of the facts and the parties.<sup>958</sup>

#### **E. “Streamlining” Criminal Prosecutions (1919)**

Lenin sought to build a world populated by “good citizens.” This required the elimination of the “bad citizens,” and Lenin regarded terror as an indispensable instrument of revolutionary government in eliminating undesirables.<sup>959</sup> The Revolutionary Tribunals, however, were not removing “bad citizens” quickly enough to satisfy Lenin. The judges worked lackadaisically, passed mild sentences, and exhibited a reluctance to impose the death penalty. In 1918, the year that included the Red Terror, the Revolutionary Tribunals tried 4,483 defendants. Only 14 received the death penalty.<sup>960</sup>

To address this lack of production, the People's Commissariat of Justice enacted a document in 1919 entitled “Leading Principles of Criminal Law.” The Commissariat redefined crime as “any act or omission dangerous to the given system of social relations.”<sup>961</sup> The “Leading Principles” stated that the proletariat should utilize criminal law for repressing its class enemies. The task of the criminal law was “the struggle against the breakers of the new

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<sup>957</sup> Richard Pipes, *The Russian Revolution* (New York: Knopf, 1990) 798. Accord, Vladimir Gsovski, “Reform of Criminal Law in the Soviet Union,” *Social Problems* 7 (4) (1960) 315-28, 316.

<sup>958</sup> Richard Pipes, *The Russian Revolution* (New York: Knopf, 1990) 798. Martin Latsis, the chief of the Ukrainian Cheka, gave the following directions to his police officers, who had full powers to initiate and decide criminal cases extrajudicially during the Red Terror: “Do not look in the file of incriminating evidence to see whether or not the accused rose up against the Soviets with arms or words. Ask him instead to which class he belongs, what is his background, his education, his profession. These are the questions that will determine the fate of the accused. That is the meaning and essence of the Red Terror.” Yevgenia Albats and Catherine A. Fitzpatrick, *The State Within a State: The KGB and Its Hold on Russia - Past, Present, and Future* (New York: Farrar, 1994).

<sup>959</sup> Richard Pipes, *The Russian Revolution* (New York: Knopf, 1990) 790.

<sup>960</sup> Richard Pipes, *The Russian Revolution* (New York: Knopf, 1990) 800.

<sup>961</sup> Stephen C. Thaman, “Russia,” *The Handbook of Comparative Criminal Law*, ed. Kevin Jon Heller and Markus D. Dubber (Stanford: Stanford U.P., 2011) 416.

conditions of common life in the transitional period of the dictatorship of the proletariat.” Only the “final smashing” of the bourgeois and intermediate classes could accomplish the goal of annihilating “both the state as an organization of coercion, and law as a function of the state.”<sup>962</sup>

The Commissariat made more changes to streamline prosecutions before the Revolutionary Tribunals. In March 1920, the Revolutionary Tribunals received discretion to deny the plaintiff and defendant the right to call and question witnesses, or even to appear to plead their case. The Revolutionary Tribunals could halt proceedings and render judgment at any time.<sup>963</sup>

Even with these changes, the Revolutionary Tribunals remained too slow and cumbersome to satisfy Lenin's quest for a power that was “limited by nothing, by no laws,” that was “restrained by absolutely no rules,” and that rested “directly on coercion.”<sup>964</sup> Lenin increasingly came to rely on the Cheka, the *Chrezvychaynaya Komissiya* (“Extraordinary Commission”) or political police, which he endowed with an almost unrestricted license to kill.<sup>965</sup>

#### **F. Revised Law Codes under the “New Economic Policy” (1921-1928)**

The “War Communism” economic policy of the Soviet government during the years of the civil war and foreign intervention from 1918 to 1920 ended with the collapse of the Soviet

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<sup>962</sup> Harold J. Berman, *Justice in the USSR: An Interpretation of Soviet Law* (Cambridge, Harvard UP, 1978) 32.

<sup>963</sup> Richard Pipes, *The Russian Revolution* (New York: Knopf, 1990) 800. *Cheka* or *VCheka* was the abbreviation of the full name of the political police, the *Vserossiyskaya Chrezvychaynaya Komissiya po Bor'bye s Kontr-revolutsiyey i Sabotazhem* (“Extraordinary Commission for the Struggle against Counterrevolution, Sabotage and Official Crimes”).

<sup>964</sup> V.I. Lenin, *Polnoe Sobranie Sochinenii* (*Complete Collected Works*), 5th ed., vol. 41 (Moscow: Institut Marksizma - Leninizma, 1958-65) 383.

<sup>965</sup> Richard Pipes, *The Russian Revolution* (New York: Knopf, 1990) 800.

economy.<sup>966</sup> The real value of Russian money in circulation on November 1, 1917, was 1,919 billion rubles. By July 1, 1921, this value had dropped 98.5% to 29 billion rubles. Production and distribution in the Soviet economy were at a standstill and the nation was bankrupt.<sup>967</sup> When the anticipated revolution in the West failed to materialize, the hope of transforming “War Communism” into genuine communism proved unviable.

In April 1921, Lenin admitted that the Soviet government had erred by going “too far on the path of nationalization of commerce and industry, and in the suppression of local trade.” The whole program of War Communism, Lenin now said, “was but a temporary measure.”<sup>968</sup> The Xth Congress thus introduced a “New Economic Policy,” known under the abbreviation of NEP, on March 21, 1921.<sup>969</sup>

The NEP was a mixed economic system containing both capitalist and socialist elements. The NEP permitted private trade, and permitted private businesses to operate under state license. The NEP legalized the hiring of labor and the renting of land for agricultural purposes in 1925. Foreign firms could do business in Russia based on “concessions.”<sup>970</sup>

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<sup>966</sup> “War Communism” involved a number of sweeping measures designed to place the entire economy, including labor, production, and distribution, under the exclusive management of the Communist Party. These measures included the nationalization of the means of production, with the temporary exception of agriculture; nationalization of transport; nationalization of all but the smallest enterprises; the liquidation of private commerce and nationalization of the retail and wholesale trade; the replacement of private commerce by a government-controlled distribution system; the elimination of money as a unit of exchange and accounting in favor of a system of state regulated barter; the imposition of the entire national economy of a single plan; and the introduction of compulsory labor for all able-bodied male adults, and on occasion also for women, children, and elders. Richard Pipes, *The Russian Revolution* (New York: Knopf, 1990) 671-679, 673.

<sup>967</sup> From January 1, 1917, to January 1, 1923, the quantity of money in Russia increased 200,000 times and the price of goods increased a staggering 100 million times. Richard Pipes, *The Russian Revolution* (New York: Knopf, 1990) 687.

<sup>968</sup> Harold J. Berman, *Justice in the USSR: An Interpretation of Soviet Law* (Cambridge, Harvard UP, 1978) 32-33.

<sup>969</sup> Samuel Kucherov, *The Organs of Soviet Administration of Justice: Their History and Operation* (Leiden: Brill, 1970) 78.

<sup>970</sup> Harold J. Berman, *Justice in the USSR: An Interpretation of Soviet Law* (Cambridge, Harvard UP, 1978) 33. On the other hand, the NEP closely supervised capitalist elements of the economy in the

The restoration of the bourgeois *market* system required the restoration to an equal degree of the bourgeois *legal* system. Lenin dispatched his jurists to review the prerevolutionary Russian law codes, as well as the German, Swiss, and French codes, and adapt them to the extant Soviet economic conditions. The result was a flurry of new legal codes.<sup>971</sup>

The mixed economic system under the NEP utilized a mixed legal system as well. The treatment of commerce, property, contracts, and torts incorporated a number of traditional concepts from European law. Since law was a “disciplining principle that helps strengthen the Soviet state and develop the socialist economy,”<sup>972</sup> however, the civil law contained a number of provisions that reflected the revolutionary purposes of the new Soviet social system.

The most famous of these was Article 1 of the Civil Code: “Civil rights should be protected by law *except in instances when they are exercised in contradiction with their social-economic purpose.*”<sup>973</sup> The Civil Code provided further that any legal transaction “directed to the obvious prejudice of the state” was invalid, and all profits accrued from such transactions were forfeit to the state as “unjust enrichment.”

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interests of the proletarian dictatorship. A large “socialist sector” of industry remained in the hands of the state. This sector included banking, insurance, transport, the production of raw materials, and foreign trade. The state continued to own the land and control its use, and the state maintained its ownership of the means of production and continued to fix prices. The NEP adopted a new strategy but shared the same end as the War Communism program, the socialization of the entire economy once it achieved economic heights.

<sup>971</sup> 1922 and 1923 produced a Judiciary Act, a Civil Code, a Code of Civil Procedure, a Criminal Code, a Code of Criminal Procedure, a Land Code, and a new Labor Code. The Soviet Government also enacted a new Criminal Code and a new Family Code in 1926. Harold J. Berman, *Justice in the USSR: An Interpretation of Soviet Law* (Cambridge, Harvard UP, 1978) 34.

<sup>972</sup> Richard Pipes, *Russia under the Bolshevik Regime* (New York: Vintage, 1994) 401. This view of law is consistent with the tsarist conception of law as a means of maintaining order rather than ensuring justice. N.M. Korkunov, *Russkoe gosudarstvennoe pravo* (St. Petersburg: Stasiulevicha, 1909) 215-22.

<sup>973</sup> Harold J. Berman, *Justice in the USSR: An Interpretation of Soviet Law* (Cambridge, Harvard UP, 1978) 36. [Emphasis added]. The Nazis later copied this principle. This principle represented an attempt to counteract the absolutist and conceptual character of the private rights granted in other sections of the Civil Code. Under this provision, a man might own his house, but if he had an extra room in it, he could be required to take in a tenant. “Thus Article 1 brought back in through the window what had been shown out through the door.”

The new criminal codes continued the practices of the Red Terror and the Revolutionary Tribunals. Under the system of “socialist legality,” political considerations played the decisive role in deciding questions of guilt, innocence and punishment. Courts were “an organ of government power,” wrote N. V. Krylenko, later People's Commissar of Justice, in his 1923 treatise on the Soviet judiciary. “A club is a primitive weapon, a rifle is a more efficient one, the most efficient is the court. For us there is no difference between a court of law and summary justice. Our judge is above all a politician, a worker in the political field, and therefore he must know what the government wants and guide his work accordingly.”<sup>974</sup>

The Soviet rulers did not intend, Krylenko continued, to have “their own hands bound” by the codification of the criminal law. The new Criminal Code had to leave room for the arbitrary imposition of punishment.<sup>975</sup> To accomplish these goals, the new Criminal Code would deny due process, authorize the punishment of innocent parties, and legitimize terror as a principle of law.

### **G. Absence of Due Process Protections under the 1926 Criminal Code**

Criminal prosecutions under the 1926 Criminal Code lacked even basic due process protections. No warrant was required to authorize an arrest. Prosecutorial approval was sufficient, even if first obtained *after* the arrest.

There was no writ of *habeas corpus*. The Criminal Code permitted authorities to hold a suspect on mere suspicion for 14 days without informing the suspect of the charges against him. In actual practice, however, there was *no limit* on the period that authorities could hold a suspect

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<sup>974</sup> G. M. Razi, “Legal Education and the Role of the Lawyer in the Soviet Union and the Countries of Eastern Europe,” *Cal. L. Rev.* 48 (5) (1960): 776-804, 792; Harold J. Berman, *Justice in the USSR: An Interpretation of Soviet Law* (Cambridge, Harvard UP, 1978) 36. Stalin ordered Krylenko's arrest and torture. Krylenko confessed. The Military Collegium convicted Krylenko and shot him as a “wrecker” in 1938. His trial lasted twenty minutes, just long enough for Krylenko to retract his confession. Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 420-21.

<sup>975</sup> Vladimir Gsovski, “Reform of Criminal Law in the Soviet Union,” *Social Problems* 7 (4) (1960) 315-28, 316.



without adjudication. Investigators were wholly exempt from judicial supervision and were only accountable to the prosecutor or the secret police for their actions.<sup>976</sup>

Authorities held prisoners incommunicado. Defendants had no right to counsel until the completion of all pre-trial investigations, procedures, and the drafting of the bill of charges.<sup>977</sup> All pretrial proceedings excluded the defendants.<sup>978</sup>

There was no presumption of innocence, and the burden of proving innocence, with the attached quandary of proving a negative, was on the accused.<sup>979</sup> There was no protection from *ex post facto* laws, and authorities applied laws retroactively.<sup>980</sup> Courts also had discretion under Article 14 of the 1926 Criminal Code to suspend the statute of limitations in cases involving “counterrevolutionary” offenses.<sup>981</sup>

The State also enjoyed an unequal right of appeal over the defendant. The accused could only appeal up one level. Prosecutors, however, enjoyed unlimited appeals.

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<sup>976</sup> Vladimir Gsovski, “Reform of Criminal Law in the Soviet Union,” *Social Problems* 7 (4) (1960) 315-28, 325. Even after the reforms of 1958, authorities could hold their prisoners for 9 months before bringing the prisoner to court. The authorities could still hold their prisoners incommunicado and exclude the prisoner from all pretrial proceedings. Vladimir Gsovski, “Reform of Criminal Law in the Soviet Union,” *Social Problems* 7 (4) (1960) 315-28, 324-25.

<sup>977</sup> Vladimir Gsovski, “Reform of Criminal Law in the Soviet Union,” *Social Problems* 7 (4) (1960) 315-28, 326. This provision remained unchanged after the 1958 reforms. *Id.*

<sup>978</sup> Vladimir Gsovski, “Reform of Criminal Law in the Soviet Union,” *Social Problems* 7 (4) (1960) 315-28, 324-25. Even after the reforms of 1958, a defendant did not have a right to counsel until after the investigation was completed, and the fruit of the investigation constituted probative and admissible evidence.

<sup>979</sup> Vladimir Gsovski, “Reform of Criminal Law in the Soviet Union,” *Social Problems* 7 (4) (1960) 315-28, 324. The Supreme Soviet explained that acceptance of the presumption of innocence “would introduce irreconcilable contradictions. The absurdity of such a principle is evident from a point of view of common sense.”

<sup>980</sup> Harold J. Berman, *Justice in the USSR: An Interpretation of Soviet Law* (Cambridge, Harvard UP, 1978) 26.

<sup>981</sup> Harold J. Berman, *Justice in the USSR: An Interpretation of Soviet Law* (Cambridge, Harvard UP, 1978) 25. This discretion applied, for example, to cases under Article 58-11 of the 1926 Criminal Code involving “active deeds or active struggle against the worker class or against the revolutionary movement carried on by a responsible or secret official (undercover agent) under the tsarist system or under counter-revolutionary governments during the Civil War.”

Defendants received no protection against double jeopardy. Prosecutors could move to reopen any case for any reason, including a claim that the punishment was too lenient. There was no time limit on the prosecution's reopening cases, and the prosecution could reopen the same case multiple times. The defendant did not receive notice that his case was under review, and the defendant had no right to appear regarding the reopening of a case.<sup>982</sup>

State security agencies, including the Cheka, GPU, OGPU, NKVD, and MVD, had the power to convict and punish any defendant. These agencies could assume jurisdiction of any criminal case and dispose of the case without interference from any court. These agencies operated without *any* rules of criminal law or procedure.<sup>983</sup>

#### **H. Soviet Legal Theory under the 1922 and 1926 Criminal Codes**

Beginning with the 1922 Criminal Code, Soviet theorists sought to develop a new theory of criminal law derived from Marxist principles. Soviet legal theorists adopted a deterministic approach to human behavior, a class point of view of justice, and the view that human beings are the product of their economic conditions. These theorists saw crime as a social phenomenon produced by social circumstances, not as a wrongful act involving a moral failing.

The Soviets therefore detached the characterization of crime and the justification of punishment from any moral basis.<sup>984</sup> The Criminal Code of 1926 omits the elements of moral guilt and moral condemnation from its statement of the purposes underlying criminal law. The

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<sup>982</sup> Vladimir Gsovski, "Reform of Criminal Law in the Soviet Union," *Social Problems* 7 (4) (1960) 315-28, 326-27.

<sup>983</sup> Vladimir Gsovski, "Reform of Criminal Law in the Soviet Union," *Social Problems* 7 (4) (1960) 315-28, 317. These agencies included the Cheka from 1917-1921, the GPU and OGPU from 1921-1939, the NKVD after 1934, and the MVD Ministry after 1946.

<sup>984</sup> Vladimir Gsovski, "Reform of Criminal Law in the Soviet Union," *Social Problems* 7 (4) (1960) 315-28, 316, 321. The significance of this departure must not be underestimated. Sidney Hook writes, "The Moscow trials taught me that any conception of socialism that rejected the centrality of moral values was only an ideological disguise for totalitarianism." Sidney Hook, *Out of Step: An Unquiet Life in the 20th Century* (New York: Harper Row, 1987) 218.

Code also omits these elements from the terminology of the criminal law, as explained below.

The new Soviet theory of criminal law developed four significant departures from the traditional principles of criminal law in the West. The first involved *the concept of crime*. Soviet theorists saw *social danger* as the basic element of crime. Crimes were therefore defined in terms of “socially dangerous acts,” and the 1926 Criminal Code abandoned the use of the term “crime” altogether.<sup>985</sup>

Article 6 of the 1926 Criminal Code defines “social danger” as danger to the Soviet regime or its legal order.<sup>986</sup> A finding of “social dangerousness” replaced any finding of individual guilt or blameworthiness in determining the judicial sanction imposed on the defendant. Soviet law thus permitted, at least in theory, the dismissal of a criminal who committed a prohibited act if the criminal or the violative act was not “socially dangerous.”<sup>987</sup>

A second major departure from traditional criminal law principles involved *the Soviet theory of punishment*. The 1926 Criminal Code specifically provided that “the criminal legislation of the USSR shall have no purposes of retribution and penalization.”<sup>988</sup> Judicial penalties, therefore, were not considered to be punishment, retribution, or expiation, and the 1926 Criminal Code abandoned the use of the term “punishment” altogether.<sup>989</sup> Instead, the Code referred to judicial penalties as “measures of social defense.” The death penalty was the

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<sup>985</sup> Vladimir Gsovski, “Reform of Criminal Law in the Soviet Union,” *Social Problems* 7 (4) (1960) 315-28, 320 n.

<sup>986</sup> Vladimir Gsovski, “Reform of Criminal Law in the Soviet Union,” *Social Problems* 7 (4) (1960) 315-28, 321. This provision appears in Article 6 of the 1926 Criminal Code.

<sup>987</sup> Stephen C. Thaman, “Russia,” *The Handbook of Comparative Criminal Law*, ed. Kevin Jon Heller and Markus D. Dubber (Stanford: Stanford U.P., 2011) 416.

<sup>988</sup> Vladimir Gsovski, “Reform of Criminal Law in the Soviet Union,” *Social Problems* 7 (4) (1960) 315-28, 321.

<sup>989</sup> Vladimir Gsovski, “Reform of Criminal Law in the Soviet Union,” *Social Problems* 7 (4) (1960) 315-28, 320 n.

“supreme measure of social defense.”<sup>990</sup>

A third major departure from traditional criminal law principles involved *the punishment of the innocent*. Authorities could punish a person in the absence of *any* criminal conduct if that person represented a threat of “social danger.”<sup>991</sup> Article 7 of the 1926 Criminal Code provided:

With regard to persons who have committed socially dangerous acts or who represent a danger because of their connection with a criminal environment or because of their past activity, measures of social defense of a judicial-correctional, medical, or medico-educational character shall be applied.<sup>992</sup>

The mere “connection with a criminal environment” was sufficient to warrant a criminal penalty. Furthermore, under Article 58 governing “counterrevolutionary” offenses, authorities could assess punishment against *innocent* family members and *innocent* dependents of convicted criminals.<sup>993</sup>

A fourth major departure from traditional criminal law principles involved *the doctrine of “crime by analogy.”*<sup>994</sup> Abandoning the traditional principle of “no crime, no punishment without a previous law,” Article 16 of the 1926 Criminal Code permitted punishment for an act even if the act was *not* prohibited by law. It was sufficient for conviction that the act was *analogous* to a prohibited act:

If any socially dangerous act is not directly provided for by the present Code, the basis and limits of responsibility for it shall be determined by application of those articles of the Code which provide for crimes most similar to it in

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<sup>990</sup> The death penalty applied to 70 crimes in 47 different sections of the Criminal Code of 1926. Vladimir Gsovski, “Reform of Criminal Law in the Soviet Union,” *Social Problems* 7 (4) (1960) 315-28, 322.

<sup>991</sup> Vladimir Gsovski, “Reform of Criminal Law in the Soviet Union,” *Social Problems* 7 (4) (1960) 315-28, 320.

<sup>992</sup> Harold J. Berman, *Justice in the USSR: An Interpretation of Soviet Law* (Cambridge, Harvard UP, 1978) 25.

<sup>993</sup> Vladimir Gsovski, “Reform of Criminal Law in the Soviet Union,” *Social Problems* 7 (4) (1960) 315-28, 320-21. Article 58.1 c, for example, provides for the punishment of otherwise innocent family members and dependents of military servicemen convicted of treason.

<sup>994</sup> For a detailed treatment of this unique legal doctrine, including its development and rationale, see Jurij Starosolskyj, *The Principle of Analogy in Criminal Law: an Aspect of Soviet Legal Thinking* (New York: Research Program of the USSR, 1954).

nature.<sup>995</sup>

As with the provisions of Article 1 of the Civil Code discussed above, the Nazis also copied the doctrine of crime by analogy.<sup>996</sup> The Soviet detachment of crime and punishment from any moral basis, coupled with the absence of due process protections for the accused, provided the Soviet government unrestricted power to impose arbitrary punishment.

### **I. Political Crimes under the Criminal Codes of 1922, 1926, and 1934**

Lenin gave his jurists precise instructions for the treatment of political crimes in the 1922 recodification of Soviet law. Lenin defined political crimes as “the propaganda and agitation or participation in organizations or assistance to organizations that help (by means of propaganda and agitation)” the international bourgeoisie. He instructed his jurists to make all such crimes punishable by death.<sup>997</sup>

Lenin also directed that Soviet law embody his views on the legitimacy and necessity of terrorizing the Russian people for political ends. On May 17, 1922, Lenin instructed his Commissar of Justice D.I. Kurskii to provide “a principled and politically correct (and not merely narrowly juridicial) essence and justification of terror. The court is not to eliminate terror - to promise this would be deceitful and delusional - but provide foundation for and legalize it on principle, clearly, without falsity or embellishment.”<sup>998</sup> The Russian legal system thus

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<sup>995</sup> Vladimir Gsovski, “Reform of Criminal Law in the Soviet Union,” *Social Problems* 7 (4) (1960) 315-28, 319; Harold J. Berman, *Justice in the USSR: An Interpretation of Soviet Law* (Cambridge, Harvard UP, 1978) 26.

<sup>996</sup> Harold J. Berman, *Justice in the USSR: An Interpretation of Soviet Law* (Cambridge, Harvard UP, 1978) 36. Article 1 of the Civil Code provides: “Civil rights should be protected by law except in instances when they are exercised in contradiction with their social-economic purpose.”

<sup>997</sup> V.I. Lenin, *Polnoe Sobranie Sochinenii (Complete Collected Works)*, 5th ed., vol. 44 (Moscow: Institut Marksizma-Leninizma, 1958-65) 190, quoted in Richard Pipes, *Russia under the Bolshevik Regime* (New York: Vintage, 1994) 401. Courts could also impose exile and imprisonment under extenuating circumstances.

<sup>998</sup> V.I. Lenin, *Polnoe Sobranie Sochinenii (Complete Collected Works)*, 5th ed., vol. 44 (Moscow: Institut Marksizma-Leninizma, 1958-65) 190, quoted in Richard Pipes, *Russia under the Bolshevik Regime* (New York: Vintage, 1994) 401.

abandoned the mission of dispensing justice and officially embraced the mission of terrorizing its own people. The systematic terror of the population through legalized executions was justified, with no sense of irony, as a means of protecting the “unconscious” proletariat from exploitation.

The result of Lenin's instructions was the prohibition of “counterrevolutionary” activities under Article 58 of the Russian Criminal Code. “Counterrevolutionary” activities were defined to include any action directed toward subverting or weakening the power of the government, the external security of the USSR, or the fundamental economic, political, and national gains of the proletarian revolution.<sup>999</sup> Article 58, as amended through Stalin's initiative in 1934, would provide the basis for Stalin's allegations against Trotsky and the other defendants in the three Moscow Trials in 1936, 1937, and 1938. Soviet law would finally realize Lenin's goal of a “power that is limited by nothing, by no laws, that is restrained by absolutely no rules, that rests directly on coercion.”<sup>1000</sup>

## **II. Trotsky's Rivalry with Stalin**

### **A. Trotsky's Theory of “Permanent Revolution”**

Leon Trotsky was born Lev Davidovich Bronshtein, the son of a prosperous Ukrainian farmer, on November 7, 1879. Bronshtein adopted the name “Trotsky” for a false passport he used while escaping from a Siberian prison in 1902.<sup>1001</sup> During the early days of the Soviet

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<sup>999</sup> Article 58-1 provided as follows: “Counterrevolutionary' is understood as any action directed toward the overthrow, subversion, or weakening of the power of worker-peasant councils or of their chosen (according to the Constitution of the USSR and constitutions of union republics) worker-peasant government of the USSR, union and autonomous republics, or toward the subversion or weakening of the external security of the USSR and the fundamental economic, political, and national gains of the proletarian revolution. In consideration of the international solidarity of interests of all workers, acts are likewise considered 'counterrevolutionary' when they are directed at any other workers' government, even if not part of the USSR.”

<sup>1000</sup> V.I. Lenin, *Polnoe Sobranie Sochinenii (Complete Collected Works)*, 5th ed., vol. 41 (Moscow: Institut Marksizma-Leninizma, 1958-65) 383.

<sup>1001</sup> Robert Payne, *The Life and Death of Trotsky* (New York: McGraw, 1977) 81-82.

Union, Trotsky served as the People's Commissar for Foreign Affairs. He later played a major role in the Bolshevik victory in the Russian Civil War as the commander of the Red Army.

Trotsky won election as one of the five full members of the first Politburo in 1919 along with Stalin and Lenin. Trotsky developed a political rivalry with Stalin,<sup>1002</sup> and the rivalry intensified after Lenin's death on January 21, 1924. Trotsky and Stalin were the chief protagonists in the contest to succeed Lenin, and their rivalry included a fierce theoretical debate over the right road to socialism.<sup>1003</sup>

Together with Alexander Parvus, Trotsky developed a theory of “uninterrupted” or “permanent revolution,”<sup>1004</sup> which Lenin adopted in his “April Theses” of April 4, 1917.<sup>1005</sup> “Permanent revolution” was a theoretical accommodation of Russia's inadequate political and economic development. The Russian Social-Democrats advocated a two-phase revolution in which a distinct phase of “bourgeois” rule preceded socialism.<sup>1006</sup> They considered a bourgeois-

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<sup>1002</sup> See Richard Pipes, *Russia under the Bolshevik Regime* (New York: Vintage, 1994) 36, 61, 99, 124, 465, 470, 476, 480, and 485.

<sup>1003</sup> Alan Wood, *Stalin and Stalinism* (King's Lynn, UK: Biddles, 2004) 23-26.

<sup>1004</sup> Richard Pipes, *The Russian Revolution* (New York: Knopf, 1990) 362. Marx had briefly promoted the concept of “Revolution in Permanence” in 1848. Leonard Schapiro, *The Communist Party of the Soviet Union* (London: Vintage, 1960) 77. Parvus first published his theory of “uninterrupted” or “permanent” revolution in his introduction to Trotsky's 1905 pamphlet *Do deviatogo Ianvaria (Before the Twenty-Second of January)*. Richard Pipes, *The Russian Revolution* (New York: Knopf, 1990) 362 n.

<sup>1005</sup> V. I. Lenin, *April Theses* (Moscow: Progress, 1971): “8. It is not our *immediate* task to 'introduce socialism,' but only to bring social production and the distribution of products at once under the *control* of the Soviets of Workers Deputies.”

<sup>1006</sup> The Russian Social-Democrats differed with the Russian Socialists-Revolutionaries on the right road to socialism. In the 1870s, the Russian Socialists-Revolutionaries developed a “separate path” doctrine according to which Russia would proceed directly from feudalism to socialism, without passing through a capitalist phase. Revolution would not result from the inevitable social consequences of matured capitalism. Instead, the Russian Socialists-Revolutionaries would instigate revolution by terror and coup d'état. The Russian Social-Democrats, led by George Plekhanov, rejected terrorism and a coup d'état because of Russia's economic and cultural underdevelopment. Even if terrorism and a coup d'état succeeded in bringing about a revolution, the Russian Social-Democrats believed that the result would not be socialism. Instead, “a revised tsarism on a Communist base” would emerge. In order to accommodate Russia's economic and political underdevelopment, Plekhanov's associate Paul Akselrod formulated a theory of two-stage revolution. In the first phase of Akselrod's theory, the proletariat would collaborate with the bourgeoisie for the common objective of bringing a “bourgeois democracy” to Russia. As soon as

democratic revolution to be necessary for overthrowing the autocracy and clearing the way for advanced capitalist development.<sup>1007</sup>

Trotsky recognized the problems presented by Russia's economic and political underdevelopment. Trotsky nevertheless theorized that Russia's proletariat, with the support of the peasantry, could accomplish *both* the bourgeois revolution and the socialist revolution. The socialist revolution would follow close upon the heels of the bourgeois revolution, and this two-phase revolution would be “uninterrupted” or “permanent.”

Russia possessed inadequate economic development to complete a socialist revolution. Trotsky maintained that the ultimate success of the Russian socialist revolution would depend on the spread of socialist revolution to advanced capitalist countries, such as England and Germany. The Russian Revolution would serve as the catalyst for an international socialist revolution.<sup>1008</sup> Despite the collapse of the Hungarian Socialist Republic in 1919, Trotsky and the Bolsheviks believed as late as 1923 that the socialist revolution would spread to Germany.<sup>1009</sup>

### **B. Stalin's Theory of “Socialism in One Country”**

When the German socialist revolution failed to materialize, Stalin rejected Trotsky's theory of permanent revolution and its claim that the ultimate success of the Russian Revolution depended on other proletarian revolutions in Europe. In 1924, Stalin advanced his own theory of “Socialism in One Country.”<sup>1010</sup>

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the “bourgeois democracy” emerged, the socialists would rally the working class for the second, socialist phase of the revolution. Richard Pipes, *The Russian Revolution* (New York: Knopf, 1990) 143-45. In 1903, the Russian Social-Democrats split into the Bolshevik (“Majority”) and Menshevik (“Minority”) factions, and the Bolsheviks eventually became the Communist Party under Lenin's leadership. Historian Robert Conquest writes that but for Lenin, the Russian Social-Democrats would have reunited. Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 4.

<sup>1007</sup> Bertrand Pautenaude, *Trotsky: Downfall of Revolutionary* (New York: HarperCollins, 2009) 45.

<sup>1008</sup> Bertrand Pautenaude, *Trotsky: Downfall of Revolutionary* (New York: HarperCollins, 2009) 45.

<sup>1009</sup> Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 16.

<sup>1010</sup> Joseph Stalin, *Foundations of Leninism* (Moscow: Foreign Languages Publishing House, 1924).



Stalin's theory maintained that the proletariat in one country could overthrow the power of the bourgeoisie. "After consolidating its power and taking the peasantry in tow, the proletariat of the victorious country can and must build up a Socialist society." Once the Socialist society is achieved, "the development and support of revolution in other countries is an essential task of the victorious revolution."<sup>1011</sup>

For Stalin, "building up a Socialist society" in the Soviet Union meant forcibly socializing the country from above. It also required the removal of his ideological opponents among the Old Bolsheviks, particularly Trotsky, who clung to the theory of permanent revolution.<sup>1012</sup> The two theories were irreconcilable. As Trotsky observed, "the theory of socialism in one country, which rose on the yeast of the reaction against October, is the only theory that consistently and to the very end opposes the theory of the permanent revolution."<sup>1013</sup>

### **C. Stalin Targets Trotsky**

Trotsky's objections to socialism in one country may have been ideologically impeccable, but they were politically disastrous,<sup>1014</sup> and Stalin ultimately outmaneuvered Trotsky in the Party. Stalin's theory of socialism in one country proved more attractive than Trotsky's theory of permanent revolution.<sup>1015</sup> Stalin and his supporters successfully orchestrated

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<sup>1011</sup> Joseph Stalin, "Excerpt from *Foundations of Leninism, Documents of Modern Political Thought*," ed. T.E. Utley and J. Stuart Maclure (London: Cambridge UP, 1957) 160.

<sup>1012</sup> Alan Wood, *Stalin and Stalinism* (King's Lynn, UK: Biddles, 2004) 24.

<sup>1013</sup> Leon Trotsky, *The Permanent Revolution and Results and Prospects* (Seattle: Red Letter, 2010) 313.

<sup>1014</sup> Sheila Fitzpatrick, *The Russian Revolution* (Oxford: Oxford UP, 2008) 115.

<sup>1015</sup> Alan Wood explains: "In practical political terms, Stalin's policy of constructing socialism in one country was simply more attractive to the party rank-and-file and those in the population who understood such things than the prospect held up by Trotsky and others of further revolutionary struggle. It was in a sense an appeal to nationalist instincts rather than internationalist dogma." Alan Wood, *Stalin and Stalinism* (King's Lynn, UK: Biddles, 2004) 25. Robert Conquest concurs: "As late as 1923, the attempted coup in Germany was expected to regularize the situation. When this failed, Stalin's theory of Socialism in One Country was propounded. It had the obvious advantage that the alternative of giving up power, or even sharing power, on theoretical grounds was naturally unattractive to those who now held all the

Trotsky's denunciation by the Party in 1924. Trotsky was expelled from the Party in 1927 and then from the Soviet Union in 1929.

Stalin then secured the condemnation of the exiled Trotsky and his son Lev Sedov in the first two Moscow Trials in 1936 and 1937.<sup>1016</sup> The Dewey Commission held its hearings regarding the 1936 Moscow Trial in April, 1937, and published its finding that the trial was a “frame-up”<sup>1017</sup> the following September.

Stalin had Trotsky assassinated in Mexico on August 20, 1940.<sup>1018</sup> Stalin's agent Ramon Mercader had gained acceptance in Trotsky's household by seducing the American Trotskyite Sylvia Ageloff. An experienced mountain climber, Mercader chose a cut-down ice ax as his murder weapon. Concealing the weapon in his raincoat, Mercader visited Trotsky on the pretext of receiving Trotsky's comments on an article Mercader had written.

As Trotsky read the article, Mercader stood behind him and delivered a “tremendous blow” to Trotsky's head. The blow was not immediately fatal. According to Mercader, Trotsky screamed for “very long, infinitely long.” One of Trotsky's guards described the scream as “a cry prolonged and agonized, half-scream, half sob.”<sup>1019</sup> Trotsky died the next day, aged 61.

Trotsky presaged his grisly death four years earlier. Writing in his journal on December 30, 1936, Trotsky noted that Stalin now regarded Trotsky's 1929 exile as a mistake. Trotsky's ideas were proving to have a life of their own. Stalin had been weighing the political pros and

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positions of power.” Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 16.

<sup>1016</sup> For a discussion of the convoluted political maneuvering between Stalin and his opponents, including Trotsky, during the struggle to succeed Lenin after Lenin's 1922 stroke, see Nathan Leites and Elsa Bernaut, *Ritual of Liquidation: The Case of the Moscow Trials* (Glencoe, IL: Free, 1954) 9-23, and Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 7-12.

<sup>1017</sup> Dewey Commission, *Not Guilty: Report of the Commission of Inquiry into the Charges Made against Leon Trotsky in the Moscow Trials*, 2<sup>nd</sup> ed. (New York: Monad, 1972) xxiii.

<sup>1018</sup> Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 412-18.

<sup>1019</sup> Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 418.

cons of liquidating Trotsky since Lenin's death in 1924, and Trotsky anticipated that Stalin would attempt Trotsky's liquidation. When Stalin acted against him, wrote Trotsky, it would not be “by any ideological measures: Stalin conducts a struggle on a totally different plane. *He seeks to strike not at the ideas of his opponent, but at his skull.*”<sup>1020</sup>

### III. The Moscow Trials

The three Moscow Trials constituted the final phase of conflicts that arose within the Party leadership after Lenin's first stroke on May 26, 1922.<sup>1021</sup> Stalin used the Moscow Trials to take revenge on the “Oppositionists,” including Trotsky, who opposed his consolidation of power.

The inspiration for Stalin's purge of his Party opponents, ironically, may have come from Stalin's greatest foreign rival, Adolf Hitler. Stalin was impressed when Hitler carried out his own purge during the “Night of the Long Knives” on June 30, 1934.<sup>1022</sup> Stalin certainly recalled how the crisis atmosphere created by the attempted assassination of Lenin on August 30, 1918, had facilitated the Red Terror. Stalin thus began formulating a plan that would remove all political rivals. The first step would be an assassination that would produce a crisis that Stalin could manipulate to his advantage. Stalin's eventual victim would be Sergei Mironovich Kirov, a rising star in the Party. As described below, Kirov emerged as a threat to Stalin's ambitions during the “Ryutin and Smirnov Affairs.”

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<sup>1020</sup> “Stalin thinks: It is necessary to rectify the mistake” [of exiling Trotsky]. To be sure, not by any ideological measures: Stalin conducts a struggle on a totally different plane. *He seeks to strike not at the ideas of his opponent, but at his skull.* Already in 1924 Stalin was weighing in his mind the arguments pro and con on the question of my physical liquidation.” Leon Trotsky, “Pages from Trotsky's Journal,” *Fourth International* 2 (5) (1941): 150-154. [Emphasis in original]. Accord, Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 418.

<sup>1021</sup> Lenin's “slow death” continued with a second stroke on December 15, 1922. From December 1922 through March 1923, Lenin composed a series of letters known as his “Last Testament.” A third stroke rendered Lenin unable to speak on March 19, 1923, and a fourth stroke ended his life on January 21, 1924.

<sup>1022</sup> Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 38.

### A. The Ryutin and Smirnov Affairs (June 1932-January 1933)

Stalin's success in expelling Trotsky from the Party and securing Trotsky's exile from the Soviet Union fueled Stalin's ambition for complete mastery of the Soviet Union. As Khrushchev observed in 1956, after Stalin defeated Trotsky, "Stalin ceased to an ever greater degree to consider the members of the party's Central Committee and even the members of the Political Bureau. Stalin thought that now he could decide all things alone and all he needed were statisticians; he treated all others in such a way that they could only listen to and praise him."<sup>1023</sup>

The Ryutin Affair involved one of the last attempts to block Stalin's consolidation of power. Marteman Ryutin, a former member of the Central Committee, wrote two documents opposing Stalin in June 1932. The first was a broadside entitled "Appeal to All Members of the All-Union Communist Party." The Appeal argued, "Stalin and his clique will not and cannot voluntarily give up their positions, so they must be removed by force... as soon as possible." Stalin interpreted the Appeal as a call for his assassination.<sup>1024</sup>

The second Ryutin document, nearly 200 pages in length, was entitled "Stalin and the Crisis of the Proletarian Dictatorship," often called "Ryutin's Platform." The Platform called for a reinstatement of Trotsky, and four of its thirteen chapters attacked Stalin's character. Ryutin called Stalin "the gravedigger of the revolution" and "the evil genius of the party and the revolution."<sup>1025</sup>

On September 23, 1932, Stalin succeeded in having Ryutin arrested and expelled from the Party. The OGPU, a forerunner of the KGB, requested instructions from the Politburo as to

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<sup>1023</sup> Nikita S. Khrushchev, *The Crimes of the Stalin Era: Special Report to the 20th Congress of the Communist Party of the Soviet Union*, ed. Boris I. Nicolaevsky (New York: New Leader, 1962) 20-21.

<sup>1024</sup> Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 24.

<sup>1025</sup> Susan Weissman, *Victor Serge: The Course is Set on Hope* (New York: Verso, 2001) 136. In the Third Moscow Trial of 1938, the prosecution characterized the essential points of the Ryutin Platform as "a palace coup, terrorism."

whether it should shoot Ryutin. Stalin argued that Ryutin deserved the death penalty because Ryutin's "Appeal" sought to incite acts of terrorism and a palace coup. Moderates on the Politburo were reluctant to agree, however, mindful of Lenin's prescription against spilling Bolshevik blood.

Sergei Mironovich Kirov spoke "with particular force against the recourse to the death penalty" and persuaded the Politburo to reject Stalin's arguments for the death penalty.<sup>1026</sup> Ryutin ultimately received 10 years' imprisonment. Stalin never forgot his defeat by Kirov in the Ryutin Affair.<sup>1027</sup> The defendants in each of the three Moscow Trials were forced to confess complicity in the Ryutin plot.

A second plot to remove Stalin, the "Smirnov Affair," became public in January 1933. This plot involved three Old Bolsheviks. A.P. Smirnov had been a Party member since 1896, V.P. Eismont since 1907, and V.N. Tolmachev since 1904. Stalin again wanted his opponents shot. Kirov again succeeded in arguing against the death penalty.<sup>1028</sup>

### **B. The Assassination of Sergei Kirov (December 1, 1934)**

Kirov was quickly becoming a favorite of the Party. When the delegates to the XVIIth Congress elected Kirov to the Central Committee in 1934, Kirov received only three negative votes, while Stalin received 292. Kirov served as the Secretary of the Central Committee and held a seat on the Politburo. As First Secretary of the Leningrad Party organization, Kirov controlled an independent source of power in the Leningrad workers.<sup>1029</sup> He was the best orator

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<sup>1026</sup> Boris I. Nicolaevsky, "Letter of an Old Bolshevik," *Power and the Soviet Elite* (New York: Praeger, 1965) 29-30; Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 24.

<sup>1027</sup> Stalin obtained vengeance against Kirov by having him murdered in 1934. Stalin obtained his vengeance against Ryutin in 1937. The Military Collegium of the Supreme Court of the USSR tried Ryutin *in camera* on January 10, 1937 and had him shot. Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 147.

<sup>1028</sup> Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 26-27.

<sup>1029</sup> Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 35-36.

the Party had produced since Trotsky, and some delegates to the XVIIth Congress in 1934 even advocated replacing Stalin with Kirov as Secretary General.<sup>1030</sup>

Stalin wanted to dispose of Kirov. Kirov interfered with Stalin's control of the Politburo, and Kirov posed a major obstacle to Stalin's goal of absolute power. The Ryutin and Smirnov affairs had taught Stalin, however, that he could not easily obtain consent for the execution of Party members for purely political offenses. Furthermore, it was difficult to find a political excuse for attacking Kirov.

Stalin chose to solve the Kirov problem by assassination.<sup>1031</sup> An assassination removed Kirov as an obstacle to Stalin's consolidation of power, and it created an atmosphere of crisis in which Stalin could blame his political enemies for Kirov's murder. Stalin could then eliminate these enemies without the irksome Politburo debates that had restricted him in the Ryutin and Smirnov Affairs.<sup>1032</sup>

Stalin directed the head of the NKVD, Genrikh Yagoda, to arrange the assassination. The NKVD selected thirty-year-old Leonid Nikolayev, an unemployed and disaffected Party member, and supplied him with a loaded pistol. After the NKVD removed Kirov's security detail on the evening of December 1, 1934, Nikolayev waited for Kirov in the shadows on the third floor of the Smolny Institute in St. Petersburg. When Kirov appeared in the corridor, Nikolayev shot him from behind in the back of the neck.<sup>1033</sup>

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<sup>1030</sup> Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 33. Stalin had 1,108 of the 1,966 delegates shot over the next four years.

<sup>1031</sup> Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 36.

<sup>1032</sup> Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 38.

<sup>1033</sup> Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 37-52. For a more detailed account of Stalin's guilt in Kirov's murder based on new material from the *glasnost* period, see Robert Conquest, *Stalin and the Kirov Murder* (New York: Oxford UP, 1989) 104-139. Boris I. Nicolaevsky writes that Nikolayev "was an unsuccessful, emotionally unstable Party member, whom Stalin's agents used as a tool for the murder of Kirov. The NKVD arrested him in his first attempt to reach Kirov, at which time he was carrying a briefcase containing a loaded revolver. On orders of the NKVD,

Stalin moved quickly to conceal his role in Kirov's assassination. Stalin immediately called for the swift punishment of the murderers and all those whose negligence enabled the assassination. Next, the NKVD officer responsible for Kirov's security, Mikhail Borisov, died under suspicious circumstances the morning after the murder on the way to his interrogation. Twelve of the top functionaries of the NKVD in Leningrad were relieved of their duties and given light prison sentences “for failing to prevent the assassination.”<sup>1034</sup> Stalin had them shot in 1937.<sup>1035</sup>

In a foreshadowing of the Moscow Trials, the Military Collegium of the Supreme Court of the USSR tried, convicted, and executed Leonid Nikolayev on December 29, 1934. Vasili Ulrikh presided as Chairman at the trial. Stalin would use Kirov's assassination as justification for the three Moscow Trials, and he would use the Military Collegium, chaired by Ulrikh, as their forum.

### **C. The “Kirov Amendments” to the Criminal Code (December 1-10, 1934)**

Almost all the necessary pieces for the Moscow Trials were now in place. Stalin had created an atmosphere of crisis, a heinous crime for which someone must pay, and he had selected his court and presiding judge. The final step in Stalin's preparation was revision of the

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however, he was released and the briefcase, together with the revolver, was returned to him.” Nikita S. Khrushchev, *The Crimes of the Stalin Era: Special Report to the 20th Congress of the Communist Party of the Soviet Union*, ed. Boris I. Nicolaevsky (New York: New Leader, 1962) 22 n. 12.

<sup>1034</sup> Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 49-50.

<sup>1035</sup> Khrushchev described the cover up as follows: “It must be asserted that to this day the circumstances surrounding Kirov's murder hide many things which are inexplicable and mysterious and demand a most careful examination. There are reasons for the suspicion that the killer of Kirov, Nikolaev, was assisted by someone from among the people whose duty it was to protect the person of Kirov. A month and a half before the killing, Nikolaev was arrested on the grounds of suspicious behaviour, but he was released and not even searched. It is an unusually suspicious circumstance that when the Chekist [Borisov] assigned to protect Kirov was being brought for an interrogation, on 2 December 1934, he was killed in a car 'accident' in which no other occupants of the car were harmed. After the murder of Kirov, top functionaries of the Leningrad NKVD were relieved of their duties and were given very light sentences, but in 1937 they were shot. We can assume that they were shot in order to cover the traces of the organizers of Kirov's killing.” Nikita S. Khrushchev, *The Crimes of the Stalin Era: Special Report to the 20th Congress of the Communist Party of the Soviet Union*, ed. Boris I. Nicolaevsky (New York: New Leader, 1962) 22.

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Just as Lenin had changed the Russian legal system by decree to facilitate the Red Terror, Stalin moved to facilitate his purge by making his own changes. Stalin implemented the “Kirov amendments” in two steps.

The first step involved a unilateral decree issued by Stalin on December 1, 1934. Stalin's decree directed all investigative agencies “to speed up the cases of those accused of *the preparation* or execution of acts of terror.” Stalin ordered courts to execute death sentences “immediately after the passage of such sentences,” and he prohibited all appeals and pardons.<sup>1036</sup>

Khrushchev observed in 1956 that this decree “became the basis for mass acts of abuse against socialist legality. During many of the fabricated court cases, the accused were charged with 'the preparation' of terroristic acts; this deprived them of any possibility that their cases might be re-examined, even when they stated before the court that their 'confessions' were secured by force, and when, in a convincing manner, they disproved the accusations against them.”<sup>1037</sup>

The second step in implementing the “Kirov amendments” involved amending the Soviet Criminal Code to deny defendants the right to prepare their cases, the right to assistance of counsel, and the right to appeal their convictions. The Soviet Government formally amended

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<sup>1036</sup> Stalin's decree provided as follows: “1. Investigative agencies are directed to speed up the cases of those accused of the preparation or execution of acts of terror. 2. Judicial organs are directed to not delay the execution of death sentences pertaining to crimes of this category in order to consider the possibility of pardon, because the Presidium of the Central Executive Committee of the USSR does not consider as possible the receiving of petitions of this sort. 3. The organs of the Commissariat of Internal Affairs are directed to execute the death sentence against criminals of the above-mentioned category immediately after the passage of sentences.” Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 41. Although this decree was technically unconstitutional, no one had the political will to challenge its unconstitutionality. The Soviet Government enacted most of the provisions of this decree nine days later as Articles 466-470.

<sup>1037</sup> Nikita S. Khrushchev, *The Crimes of the Stalin Era: Special Report to the 20th Congress of the Communist Party of the Soviet Union*, ed. Boris I. Nicolaevsky (New York: New Leader, 1962) 22. Historian Robert Conquest calls Stalin's December 10, 1934 decree a “Charter of Terror.” Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 41.



the Criminal Code on December 10, 1934, by adding new Articles 466-470. These new Articles governed cases involving terrorist organizations and terrorist acts under Articles 58-8 and 58-11 of the 1926 Criminal Code. Violations of Articles 58-8 and 58-11 formed the core charges in all three of the Moscow Trials.

The new Article 466 mandated that investigators complete all investigations of alleged terrorism in no more than ten days. Article 467 required that defendants receive their indictment only one day before trial. Article 468 required that no lawyers could assist the defendants. Article 469 denied all appeals or requests for clemency, and Article 470 required that courts conduct executions immediately after sentencing.<sup>1038</sup> Under Stalin's direction, the NKVD used the period from July 1935 to August 1936 to interrogate witnesses and obtain confessions in preparation for the first Moscow Trial.<sup>1039</sup>

#### **D. The Trial of the Sixteen of the Trotskyite-Zinovievite Terrorist Center (August 1936)**

The first of the three Moscow Trials, the "Trial of the Sixteen," took place from August 19 to August 24, 1936, before the Military Collegium of the Supreme Court of the U.S.S.R., a panel of three military judges.<sup>1040</sup> The sixteen defendants represented a large part of the old

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<sup>1038</sup> "466. Investigations into cases about terrorist organizations and terrorist acts against workers for the Soviet authority (arts. 58-8 and 58-11 of the Criminal Code) shall be completed within a term of no more than ten days. 467. The indictment shall be handed to the accused one day in advance of the review of the case in court. 468. Cases are to be heard without participation of lawyers. 469. Appeals of the verdict, and likewise appeals for clemency, are not to be allowed. 470. Sentences to the supreme measure of punishment are to be carried out immediately upon passing the sentence. Resolution of VCIK and SNK 10 December 1934 (SU 1935 No. 2 art. 8)."

<sup>1039</sup> Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 78-83.

<sup>1040</sup> The Military Collegium of the Supreme Court of the USSR originated in 1924 as an ancillary to the Supreme Court to handle cases involving the higher ranking military and political personnel of the Red Army and Fleet. In June 1934, it assumed jurisdiction of cases involving "counterrevolutionary activity" under Article 58 of the Criminal Code of 1934. Vasily Ulrikh served as the Chairman of the Collegium from 1926 until 1948, presiding over all three of the Moscow Trials. Ulrikh advanced to his position by developing a reputation for "efficiency" in handling cases, often conducting entire trials and rendering verdicts in only 15 minutes. The Military Collegium under Ulrikh tried an estimated 40,000 "enemies of the people: behind closed doors, sentencing most of them to death." Marc Jansen and Nikita Petrov, "Mass

Bolshevik guard, and two of the defendants, Grigory Zinoviev and Lev Kamenev, were former prominent party leaders.<sup>1041</sup> Stalin regarded Trotsky, Zinoviev, and Kamenev as genuine rivals whom he must crush. Together with Stalin, Zinoviev and Kamenev had formed a *troika* in the fall of 1923 that focused on the marginalization of Trotsky within the Party.<sup>1042</sup> After obtaining the official Party denunciation of Trotsky in 1924, however, Stalin abandoned this *troika* and formed a new alliance in 1925 with *Pravda's* editor Nikolai Bukharin and Soviet Prime Minister Alexei Rykov. When the first *troika* with Stalin finally disintegrated in 1925, Zinoviev and Kamenev turned to Trotsky for political support, forming the “United Opposition” against Stalin.<sup>1043</sup>

The defendants were charged under articles 19,<sup>1044</sup> 58(8),<sup>1045</sup> and 58(11)<sup>1046</sup> of the

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Terror and the Court: The Military Collegium of the USSR,” *Europe-Asia Studies* 58 (4) (2006) 589-602, 589.

<sup>1041</sup> The defendants in the “Trial of the Sixteen” included G.E. Zinoviev, L.B. Kamenev, G.E. Evdokimov, I.N. Smirnov, I.P. Bakayev, V. A. Ter-Vaganyan, S. V. Mrachkovsky, E. A. Dreitzer, E. S. Holtzman, I. I. Reingold, R. V. Pickel, V. P. Olberg, K. B. Berman-Yurin, Fritz David (I. I. Kruglyansky), M. Lurye, and N. Lurye.

<sup>1042</sup> This *troika* controlled the Party apparatus through Stalin's Secretariat and controlled *Pravda* through its editor Nikolai Bukharin. In the fall of 1923, the troika of Stalin, Zinoviev, and Kamenev managed delegate selection prior to the XIIIth Party Congress and secured a majority of seats. The troika then orchestrated the denunciation of Trotsky and Trotskyism at the XIIIth Party Congress from January 16 to January 18, 1924. Lenin died soon after on January 21, 1924. After Trotsky was defeated, tensions mounted between Stalin and the other two members of the *troika*.

<sup>1043</sup> Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 9-11.

<sup>1044</sup> “19. Attempts at any crime, and likewise preparatory actions for crime, manifested in the finding or employment of tools, means and the creation of conditions of crime, are punishable in the same way as crimes committed; accordingly, the court when choosing a measure of social defense of a judicial-corrective character must be guided by the dangerousness of the person committing the crime or the attempt, the degree of preparation of the crime, and the nearness of the arrival of its consequences, and likewise the reasons for which the crime was not carried to a conclusion. In cases, where the crime was not carried out due to the voluntary refusal of the person, who had intended to carry out the crime, to perpetrate it, the court will impose measures of social defense corresponding to those acts that actually had been carried out by the attempter or preparer.”

<sup>1045</sup> “58-8. The perpetration of terrorist acts, directed against representatives of Soviet authority or activists of revolutionary worker's and peasants' organizations, and participation in the performance of such acts, even by persons not belonging to a counterrevolutionary organization, shall be punishable by measures of social defense, indicated in article 58-2 of this code. [6 June 1927 (SU No 49, art. 330)].” Article 58-2 provided: “58-2. Armed uprising or incursion with counterrevolutionary purposes on Soviet territory by

Criminal Code of 1934 for forming a “Trotskyite-Zinovievite Terrorist Center,” a conspiracy to seize power by assassination of the Soviet leadership. The conspiracy allegedly carried out the assassination of Sergei Kirov on December 1, 1934, and planned the assassination of other leaders, including Stalin.

All sixteen defendants, after purportedly waiving counsel and choosing to represent themselves, confessed to plotting with Trotsky to murder Kirov, Stalin, and other Soviet leaders. The Military Collegium convicted all sixteen defendants, had them shot, and confiscated their property. The Military Collegium also convicted Trotsky and his son Lev Lvovich Sedov *in absentia* but did not sentence them.<sup>1047</sup>

#### **E. The Trial of the Seventeen of the “Anti-Soviet Trotskyite Center.” (January 1937)**

The Military Collegium conducted the second Moscow Trial, the “Trial of the

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armed bands, seizure of power in the center or areas with the same purposes, or, in particular, with the purpose of forcibly severing from the USSR and an individual union republic, any part of its territory, or of breaking agreements between the USSR and foreign states, shall be punishable by--the supreme measure of social defense-- shooting, or proclamation as an enemy of the workers, with confiscation of property and with deprivation of citizenship of the union republic, and likewise of citizenship of the Soviet Union and perpetual expulsion beyond the borders of the USSR, with the allowance under extenuating circumstances of reduction to deprivation of liberty for a term of no less than three years, with confiscation of all or part of one's property [6 Jun 1927 (SU No 49, art 330)].”

<sup>1046</sup> “58-11. Any type of organizational activity, directed toward the preparation or carrying out of crimes indicated in this chapter, and likewise participation in an organization, formed for the preparation or carrying out of one of the crimes indicated in this chapter, shall be punishable by--measures of social defense, indicated in the corresponding articles of this code. [6 June 1927 (SU No 49, art. 330)].”

<sup>1047</sup> The verdict provided as follows regarding Trotsky and his son: “Lev Davidovich Trotsky, and his son, Lev Lvovich Sedov, now abroad, convicted by the evidence of the accused I.N. Smirnov, E. S. Holtzman, Dreitzer, V. Olberg, Fritz David (I. I. Kruglyansky), and Berman-Yurin, and also by the materials in the present case as having directly prepared and personally directed the organization in the USSR of terroristic acts against the leaders of the CPSU and the Soviet State, are subject, in the event of their being discovered on the territory of the USSR, to immediate arrest and trial by the Military Collegium of the Supreme Court of the USSR.” People’s Commissariat of Justice of the USSR, *Report of Court Proceedings in the Case of the Trotskyite-Zinovievite Terrorist Centre Heard Before the Military Collegium of the Supreme Court of the U.S.S.R., Moscow, August 19-24, 1936* (New York: Fertig, 1967) 180.

Seventeen,” from January 23 to January 30, 1937.<sup>1048</sup> Unlike the first trial, these defendants did not represent genuine political rivals to Stalin's power. Some defendants were former Trotskyites who represented the most distinguished remaining figures of the old Bolsheviks. Stalin wanted revenge against these former Trotskyites for opposing him in the 1920s, and the second Moscow Trial operated as a preventative clean sweep of the remaining Trotskyites.<sup>1049</sup>

Georgy Pyatakov was a former Trotskyite who had switched to Stalin's side and remained loyal to Stalin for years, but Stalin viewed him as a potential leader and thus as a potential threat.<sup>1050</sup> Karl Radek, another former Trotskyite, had operated with great daring and skill in Berlin in 1919 in attempting to bring about the international socialist revolution. He was a former member of the Central Committee, and he had helped write the Soviet Constitution of 1936.<sup>1051</sup> Grigori Sokolnikov was a former Soviet Commissar of Finance and the ablest remaining Trotskyite politician. Sokolnikov had been a major leader of Stalin's opposition in 1926.<sup>1052</sup> Leonid Serebryakov was a former Deputy Commissar of Railways. He was expelled from the Party for running an illegal printing press in a last ditch effort to make a Trotskyite appeal to the workers.<sup>1053</sup>

Other defendants held prominent positions of authority over Soviet industry. Ten of the seventeen defendants were top officials in the NKTP, the People's Commissariat of Heavy

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<sup>1048</sup> The seventeen defendants included Y.L. Pyatakov, K.B. Radek, G.Y. Sokolnikov, L.P. Serebryakov, N.I. Muralov, Y.A. Livshitz, Y.N. Drobnis, M.S. Boguslavsky, I.A. Knyazev, S.A. Rataichak, B.O. Norkin, A.A. Shestov, M.S. Stroilov, Y.D. Turok, I.Y. Hrasche, G.E. Pushin, and V.V. Arnold.

<sup>1049</sup> Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 147.

<sup>1050</sup> Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 140.

<sup>1051</sup> Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 9.

<sup>1052</sup> Nathan Leites and Elsa Bernaut, *Ritual of Liquidation: The Case of the Moscow Trials* (Glencoe, IL: Free, 1954) 10. When Stalin's *troika* with Zinoviev and Kamenev dissolved in 1925, Zinoviev and Kamenev allied themselves with Sokolnikov, who was then Soviet Commissar of Finance. Stalin wanted revenge for Sokolnikov's earlier opposition.

<sup>1053</sup> Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 9.

Industry.<sup>1054</sup>

The seventeen defendants were accused of treason, espionage, acts of diversion, undermining, wrecking activities, and the preparation of terrorist acts in violation of articles 58(1a),<sup>1055</sup> 58(8), 58(9),<sup>1056</sup> and 58(11) of the Criminal Code. The indictment claimed that Defendants Pyatakov, Radek, Sokolnikov and Serebryakov, under Trotsky's direction, formed an underground conspiracy in Moscow in 1933 referred to as the "Anti-Soviet Trotskyite Center." This group acted in parallel with the "Trotskyite-Zinovievite Terrorist Center," made the subject of the first trial.

The principal aims of the parallel "Anti-Soviet Trotskyite Center" were to overthrow the government, restore capitalism, and restore the power of the bourgeoisie. To accomplish these goals, the defendants engaged in diversions, espionage, and terrorist activities designed to undermine the economic and military power of the Soviet Union. They also sought to expedite the armed attack of the Soviet Union by Germany and Japan. Lastly, they sought to assist Germany and Japan in defeating the Soviet Union and establishing a Trotskyite government.

All defendants pled guilty to the charges against them. Karl Radek, Grigori Sokolnikov,

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<sup>1054</sup> Oleg V. Khlevniuk, *In Stalin's Shadow: The Career of "Sergo" Ordzhonikidze* (Armonk, NY: Sharpe, 1995) 118-19. The NKTP was the *Narodnyi komissariat tyazheloi promyshlennosti*, the People's Commissariat of Heavy Industry.

<sup>1055</sup> "58-1a. Treason to the motherland, i.e. acts done by citizens of the USSR in damage to the military power of the USSR, its national sovereignty, or the inviolability of its territory, such as: espionage, betrayal of military or state secrets, crossing to the side of the enemy, flight (by surface or air) abroad, shall be punishable by--the supreme measure of criminal punishment-- shooting with confiscation of all property, or with mitigating circumstances-- deprivation of liberty for a term of 10 years with confiscation of all property [20 July 1934 (SU No 30, Art. 173)]."

<sup>1056</sup> "58-9. Destruction or damage with a counterrevolutionary purpose by explosion, arson, or other means of railroad or other routes and means of transportation, means of public communication, water conduits, public depots and other structures, or state and community property, shall be punishable by--measures of social defense, indicated in art. 58-2 of this code. [6 June 1927 (SU No 49, art. 330)]."

and Valentin Arnold received prison terms of ten years.<sup>1057</sup> M.S. Stroilov, the chief engineer for the Kuzbass Coal Trust, received eight years. These four defendants did not escape death for long. Cellmates killed Radek and Sokolnikov in 1939, and guards shot Arnold and Stroilov in prison in 1941.<sup>1058</sup>

The Military Collegium had the remaining thirteen defendants shot.<sup>1059</sup> The sentence in the second trial again convicted Trotsky and his son Lev Lvovich Sedov *in absentia* but did not stipulate any penalty for them.<sup>1060</sup>

#### **F. The Trial of the Twenty-One of the “Bloc of Rights and Trotskyites” (March 1938)**

The Military Collegium conducted the third Moscow Trial, the “Trial of the Twenty-One,” from March 2 to March 13, 1938.<sup>1061</sup> Historian Robert Conquest describes this largest of the three Moscow Trials as “little more than a victory parade.” Stalin had crushed his opposition and the semi-independent voices among his own supporters in the previous trials. Stalin used the

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<sup>1057</sup> The prosecution accused Arnold, former chauffeur to Stalin's protégé and Minister of Foreign Affairs Vyacheslav Molotov, with attempting to kill Molotov by driving his car into a ditch. Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 156-59.

<sup>1058</sup> Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 165.

<sup>1059</sup> People's Commissariat of Justice of the USSR, *Report of Court Proceedings in the Case of the Anti-Soviet Trotskyite Centre Heard Before the Military Collegium of the Supreme Court of the U.S.S.R., Moscow, January 23-30, 1937* (Moscow: People's Commissariat of Justice of the USSR, 1937) 579.

<sup>1060</sup> The verdict provided as follows regarding Trotsky and his son: “Enemies of the people, Lev Davidovich Trotsky, and his son, Lev Lvovich Sedov, now abroad, who were in 1929 deported from the USSR and by the decision of the Central Executive Committee of the USSR of February 20, 1932, were deprived of citizenship of the USSR, having been convicted by the testimony of the accused Y.L. Pyatakov, K.B. Radek, A.A. Shestov, and N.I. Muralov, and by the evidence of V.G. Romm and D.P. Bukhartsev, who were examined as witnesses at the trial, as well as by the materials in the present case, of personally directing the treacherous activities of the Trotskyite anti-Soviet center, in the event of there being discovered on the territory of the USSR, are liable to immediate arrest and trial by the Military Collegium of the Supreme Court of the USSR.” People's Commissariat of Justice of the USSR, *Report of Court Proceedings in the Case of the Anti-Soviet Trotskyite Centre Heard Before the Military Collegium of the Supreme Court of the U.S.S.R., Moscow, January 23-30, 1937* (Moscow: People's Commissariat of Justice of the USSR, 1937) 580.

<sup>1061</sup> The defendants included Nikolai Bukharin, A.I. Rykov, G.G. Yagoda, N.N. Krestinsky, K.G. Rakovsky, A.P. Rosengoltz, V.I. Ivanov, M.A. Chernov, G.F. Grinko, I.A. Zelensky, S.A. Bessonov, A. Ikramov, F. Khodjayeve, V.F. Sharangovich, P.T. Zubarev, P.P. Bulanov, L.G. Levin, D.D. Pletnev, I.N. Kazakov, V.A. Maximov-Dikovsky, and P.P. Kryuchkov.

third Moscow Trial to tie together the threads of opposition, terror, sabotage, treachery, and espionage alleged in the earlier trials into a single great conspiracy.<sup>1062</sup>

Two of the defendants, Nikolai Bukharin and A.I. Rykov, had joined with Stalin to form Stalin's second *troika* in 1925. Bukharin had been the editor of *Pravda* and Rykov had been Soviet Prime Minister. Together they helped Stalin secure the expulsion of Stalin's former *troika* members Grigory Zinoviev and Lev Kamenev from the Party in December 1927. Zinoviev and Kamenev had been victims of Stalin's first Moscow Trial in 1936. Bukharin and Rykov now shared their fate.

A surprising defendant in the third trial was G.G. Yagoda. As head of the NKVD, Yagoda had organized the assassination of Kirov for Stalin in 1934. He had also supervised the arrests, interrogations, and “confessions” of the defendants for the first Moscow Trial. Yagoda had fallen out of favor with Stalin, however, after expressing sympathy for defendants Grigory Zinoviev and Lev Kamenev in the first Moscow Trial. Stalin dismissed Yagoda as head of the NKVD on September 26, 1936, for being “unequal to the task of exposing the Trotskyite-Zinovievite bloc.”<sup>1063</sup>

This third Moscow Trial included allegations of “medical murders” against three Kremlin physicians, sixty-eight year old Lev Levin, sixty-six year old Dimitry Pletnev, and Ignaty Kazakov. The indictments accused these physicians of conspiring with Yagoda to execute a series of murders by poisoning or mistreating their patients. The alleged victims included the author Maxim Gorky; Gorky's son, Maxim Peshkov; Vyacheslav Menzhinsky, Yagoda's predecessor as head of the NKVD; and Valerian Kuybishev, a Politburo member and Stalin's

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<sup>1062</sup> Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 341.

<sup>1063</sup> Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 138.

primary economic advisor.<sup>1064</sup>

The 21 defendants were accused of forming a conspiratorial group named the “Bloc of Rights and Trotskyites” to conduct espionage on behalf of England, Poland, Germany, and Japan. They were also accused of wrecking, diversionist, and terrorist activities in violation of articles 58(1a), 58(2),<sup>1065</sup> 58(7),<sup>1066</sup> 58(8), 58(9), 58(11), and 58(13)<sup>1067</sup> of the Criminal Code. As in the first two Moscow Trials, Trotsky was the alleged inspiration for their conspiracy and the defendants allegedly carried out Trotsky’s direct instructions. The alleged goals of the conspirators included undermining the military power of the USSR, provoking a military attack against the USSR, dismembering the USSR for the benefit of foreign states, and restoring capitalism and the power of the bourgeoisie.

All of the defendants purportedly refused counsel except for the alleged medical murderers, Levin, Pletnev, and Kazakov. All but three of the defendants received the death sentence. Pletnev received twenty-five years in prison. Christian Rakovsky, a Trotskyite and

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<sup>1064</sup> Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 375-90. Conquest argues that each of the physician defendants was innocent.

<sup>1065</sup> “58-2. Armed uprising or incursion with counterrevolutionary purposes on Soviet territory by armed bands, seizure of power in the center or areas with the same purposes, or, in particular, with the purpose of forcibly severing from the USSR and an individual union republic, any part of its territory, or of breaking agreements between the USSR and foreign states, shall be punishable by--the supreme measure of social defense-- shooting, or proclamation as an enemy of the workers, with confiscation of property and with deprivation of citizenship of the union republic, and likewise of citizenship of the Soviet Union and perpetual expulsion beyond the borders of the USSR, with the allowance under extenuating circumstances of reduction to deprivation of liberty for a term of no less than three years, with confiscation of all or part of one's property [6 Jun 1927 (SU No 49, art 330)].”

<sup>1066</sup> “58-7. The undermining of state production, transport, trade, monetary relations or the credit system, or likewise cooperation, done with counterrevolutionary purposes, by means of corresponding use of state institutions and enterprises or impeding their normal activity, and likewise use of state institutions and enterprises or impeding their activity, done in the interests of former owners or interested capitalist organizations, shall be punishable by--measures of social defense, indicated in article 58-2 of this code. [6 June 1927 (SU no 49, art. 330)].”

<sup>1067</sup> “58-13. Active participation or active fighting against the working class and revolutionary movement, manifested in a responsible or secret position in the tsarist regime, or with counterrevolutionary governments in a period of civil war, shall be punishable by-- measures of social defense, indicated in art. 58-2 of this code. [6 June 1927 (SU No 49, art. 330)].”



former member of the Central Committee, received twenty years.<sup>1068</sup> Sergei Bessonov, who as Counselor in the Soviet Embassy in Berlin had allegedly been a contact man for Trotsky and Sedov, received fifteen years.<sup>1069</sup>

#### **IV. The Dewey Commission**

##### **A. Support for the Moscow Trials in the American Liberal Community**

Stalin's prosecution of the three Moscow Trials received significant international support, including strong support from the American liberal community.<sup>1070</sup> Two influential liberal magazines, *The New Republic* and *The Nation*, ran editorials arguing that the Moscow Trials were legitimate,<sup>1071</sup> and articles in the *New York Times* repeatedly defended Stalin and the Moscow Trials.<sup>1072</sup>

Philosopher Sidney Hook wrote that support for the Moscow Trials required "important segments of the American liberal community to betray their own principles."<sup>1073</sup> "The greatest shock connected with the trials," recalled Hook, "was the discovery that hundreds of people proud of the liberal American heritage, which they had invoked in criticizing injustice in the

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<sup>1068</sup> Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 359-61.

<sup>1069</sup> Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 344.

<sup>1070</sup> See, e.g., Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 463-476; Jacob Heilbrunn, "The *New York Times* and the Moscow Show Trials," *World Affairs* 153 (3) (1991): 87-101; Bertrand Pautenaude, *Trotsky: Downfall of Revolutionary* (New York: HarperCollins, 2009) 33-40.

<sup>1071</sup> Bertrand Pautenaude, *Trotsky: Downfall of Revolutionary* (New York: HarperCollins, 2009) 37. The editorials argued that the trials must be legitimate. Otherwise, Stalin would not allow them to proceed, since the trials were hurting Moscow's reputation at a time of mounting international danger.

<sup>1072</sup> Jacob Heilbrunn, "The *New York Times* and the Moscow Show Trials," *World Affairs* 153 (3) (1991): 87-101.

<sup>1073</sup> Sidney Hook, "Memories of the Moscow Trials," *Commentary* 77(3) (1984): 57-63, 57. Bertrand Pautenaude describes Hook as one of John Dewey's "most illustrious former doctoral students at Columbia University," "a leading Marxist philosopher and a professor at New York University. Hook was not a Trotskyist, but after years of tortured relations with the American Communist Party, he had turned against Soviet communism." Bertrand Pautenaude, *Trotsky: Downfall of Revolutionary* (New York: HarperCollins, 2009) 39.

United States, Italy, Germany, and Spain, abandoned that heritage when questions were raised about justice in the Soviet Union.”<sup>1074</sup>

The reporting of Walter Duranty and Harold Denny of the *New York Times* exemplified American support for the Moscow Trials.<sup>1075</sup> As the *Times* correspondent for the first two trials, Duranty discounted claims of confessions induced by torture as “preposterous” and “sheer romance.” The Soviet secret police eschewed torture, he wrote, because they realized that torture produces confessions that are “untrue and therefore useless.”<sup>1076</sup> Rather than indicating the use of torture, the inherent improbabilities in the confessions merely reflected the innate Russian desire “to unburden the soul.”<sup>1077</sup> The confessions proved that the accusers had shown the defendants “sufficient proof” of their guilt.<sup>1078</sup>

Duranty characterized the Moscow Trials as “growing pains” necessary for the maturation of the Soviet state, no more troubling than “the pimples on the nose of an

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<sup>1074</sup> Sidney Hook, “Memories of the Moscow Trials,” *Commentary* 77(3) (1984): 57-63, 57.

<sup>1075</sup> Jacob Heilbrunn, “The *New York Times* and the Moscow Show Trials,” *World Affairs* 153 (3) (1991): 87-101.

<sup>1076</sup> Walter Duranty, “Why Stalin Wages Merciless War on Trotsky,” *New York Times Magazine*, 7 Feb. 1937: 22.

<sup>1077</sup> Walter Duranty, “Why Stalin Wages Merciless War on Trotsky,” *New York Times Magazine*, 7 Feb. 1937: 22: “Russians are different. There comes a point when their resistance breaks and they say ‘*nichevo*’... to use an American expression, ‘spill the works.’ In other words: ‘If I am caught and they have the goods on me, why not come clean?’ – corresponding to the ‘unburdening of the soul’ which is the basis... of the confession in the Roman Catholic Church.” Trotsky called this claim regarding the Russian soul a lie in his speech, “I Stake My Life.” Directing his remarks directly to Walter Duranty, Trotsky said, “You lie gentlemen, about the Russian soul. You lie about the human soul in general.” Trotsky attributed the confessions to desperate attempts by the defendants to save their lives and their families, already held as hostages. Bertrand Pautenaude, *Trotsky: Downfall of Revolutionary* (New York: HarperCollins, 2009) 36-37, 34.

<sup>1078</sup> Walter Duranty, “Why Stalin Wages Merciless War on Trotsky,” *New York Times Magazine*, 7 Feb. 1937: 22. “Russians know-and knew before the Revolution-that their people will confess if confronted not by torture but with sufficient proof. In the recent trial Russians were faced with such groups. And accordingly confessed.”

adolescent.”<sup>1079</sup> In any event, the first two Moscow Trials conclusively exposed Trotsky as a murderer and a sordid conspirator.<sup>1080</sup> Stalin, not Trotsky, was “Lenin’s disciple and a prolonger of Lenin’s work.”<sup>1081</sup> “Like Lenin, Stalin kept in touch with the masses. Trotsky went his own way and preferred intrigue and conspirative cabals.”<sup>1082</sup>

Harold Denny was the *Times* correspondent for the third Moscow Trial. Denny emphasized the confession of Grigory Yagoda, the secret police chief who extracted the confessions used in the first Moscow Trial. For Denny, Yagoda’s complicity in the conspiracies explained the Soviet leadership’s ignorance of such widespread espionage, and this in turn proved the Moscow Trials were not “fakes.”<sup>1083</sup> Even Russian schoolchildren recognized the justice of the Moscow Trials in calling for the deaths of these “fascist reptiles and hirelings.”<sup>1084</sup>

Denny also defended the use of coerced confessions from unseen witnesses in the trials. The use of torture, Denny argued, “did not necessarily prove that the confessions were in essence

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<sup>1079</sup> Walter Duranty, “Suspicion in Soviet Sharp since Trial,” *New York Times*, 4 Feb. 1937: 8: “even such events as the recent trial are ... no more than ‘growing pains’ of the Soviet Union, to use Lenin’s phrase in the sense that he doubtless intended. The amazingly rapid progress of this nation from a state of slavery to discipline and self-government, from childhood to manhood, and, last but not least, from backward agrarianism to modern industrialization cannot be accomplished without such distressing phenomena as the pimples on the nose of an adolescent or more serious abscesses like this ‘Trotskyist’ trial.”

<sup>1080</sup> Walter Duranty, “Why Stalin Wages Merciless War on Trotsky,” *New York Times Magazine*, 7 February 1937: 3, discussed in Jacob Heilbrunn, “The *New York Times* and the Moscow Show Trials,” *World Affairs* 153 (3) (1991): 87-101.

<sup>1081</sup> Walter Duranty, “Why Stalin Wages Merciless War on Trotsky,” *New York Times Magazine*, 7 February 1937: 3.

<sup>1082</sup> Walter Duranty, “Why Stalin Wages Merciless War on Trotsky,” *New York Times Magazine*, 7 February 1937: 3.

<sup>1083</sup> Harold Denny, “Wide Plot Shown in Moscow Trial,” *New York Times*, 14 Mar. 1938. “If Mr. Yagoda was a traitor, as I fully believe he was, that flaw [the Soviet leaders’ long ignorance of the alleged widespread conspiracies] disappears.”

<sup>1084</sup> Harold Denny, “20 Admit Charges,” *New York Times*, 3 Mar. 1938: 15. “Even children call for death. *Pionerskaya Pravda* published today a resolution by schoolchildren in many parts of Russia demanding that the court order the shooting of all fascist reptiles and hirelings.”

untrue.”<sup>1085</sup> Stalin still has supporters in American academia that make similarly specious arguments. J. Arch Getty asserts that Stalin was innocent of complicity in Kirov's murder. As proof, Getty relies on Yagoda's confession in the 1938 Moscow Trial that Stalin's opposition was responsible.<sup>1086</sup>

Khrushchev admitted in 1956 that the confessions of the defendants in the Moscow Trials were false. Interrogators subjected the defendants to “barbaric,” “cruel,” and “inhuman tortures” to obtain their confessions.<sup>1087</sup> As historian Robert Conquest observes, “not even high intelligence or a sensitive spirit are of any help once the facts of a situation are deduced from a political theory, rather than vice versa.”<sup>1088</sup>

Joseph E. Davies, the U.S. Ambassador to Moscow from 1936 to 1938, was another supporter of the Moscow Trials. Davies wrote on June 8, 1938, “I shall always feel under a special obligation to Walter Duranty who told the truth as he saw it and has the eyes of

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<sup>1085</sup> Harold Denny, “Wide Plot Shown in Moscow Trial,” *New York Times*, 14 Mar. 1938: “However much coercion may or may not have been used on the various prisoners and unseen witnesses, it does not necessarily prove that the confessions in essence were untrue.”

<sup>1086</sup> J. Arch Getty, *Origins of the Great Purges: The Soviet Communist Party Reconsidered, 1933-1938* (New York: Cambridge UP, 1988) 208: “Similarly, the head of the NKVD at the time, Genrikh Iagoda (to whom Stalin allegedly gave instructions to kill Kirov), confessed in open court in 1938 to having killed Kirov at the instigation of the opposition. If Stalin had used Iagoda to assassinate Kirov, it would have been very dangerous to allow him to appear later before the microphones of the world press. Iagoda knew that he would be shot anyway, it would have been easy for him to let slip that Stalin had put him up to it. Stalin would not have taken the risk of such a damaging assertion's coming to light.”

<sup>1087</sup> Nikita S. Khrushchev, *The Crimes of the Stalin Era: Special Report to the 20th Congress of the Communist Party of the Soviet Union*, ed. Boris I. Nicolaevsky (New York: New Leader, 1962) 20, 27. “It became apparent that many Party, Soviet and economic activists who were branded in 1937-1938 as enemies were actually never enemies, spies, wreckers, etc., but were always honest Communists; they were only so stigmatized, and often, no longer able to bear barbaric tortures, they charged themselves with all kinds of grave and unlikely crimes.” *Id.* at 20. “Now, when the [1937-1938] cases of some of these so-called 'spies' and 'saboteurs' were examined, it was found that all their cases were fabricated. Confessions of guilt of many arrested and charged with enemy activity were gained with the help of cruel and inhuman tortures.” *Id.* at 22.

<sup>1088</sup> Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 463. Conquest was speaking of English poet John Cornford who wrote a poem praising Stalin's murder of Sergei Kirov, which Stalin then used as a pretext for the first Moscow Trial. Cornford wrote, “Nothing is ever born without screaming and blood.” Conquest describes this poem as an “illustration of the way in which the generous impulse of Western Communism could be befouled by Stalinism.” *Id.*

genius.”<sup>1089</sup> Davies later praised Stalin’s Great Terror as a “decisive and energetic effort” that “established order in the country and freedom from treason.”<sup>1090</sup>

Warner Brothers made Davies’ memoir, *Mission to Moscow*,<sup>1091</sup> into a film that whitewashed the Moscow Trials.<sup>1092</sup> The film, like Denny’s coverage, emphasizes Yagoda’s confession in the third trial. The defendants calmly explain that they confessed to clear their consciences, and they repeatedly acknowledge Trotsky as the mastermind behind their conspiracies.<sup>1093</sup> Davies, sitting in the audience, accepts their confessions. “Based on twenty years of trial practice,” he tells a pool of reporters, “I am inclined to believe these confessions.”

<sup>1094</sup>

Washington’s Office of War Information praised the film’s portrayal of the Moscow Trials. “The presentation of the Moscow trials is a high point in the picture that should do much to dispel the fears which many honest persons have felt with regard to our alliance with Russia.”<sup>1095</sup> Years later, the film’s producer Robert Bruckner described *Mission to Moscow* as “an expedient lie for political purposes, glossily covering up important facts with full or partial

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<sup>1089</sup> Joseph E. Davies, *Mission to Moscow* (New York: Simon and Schuster, 1941) 352.

<sup>1090</sup> Arkady Vaksberg, *Stalin’s Prosecutor: The Life of Andrei Vyshinsky* (New York: Grove Weidenfeld, 1991) 343 n. 22. Davies continued to applaud Stalin’s purge trials during World War II: “It is quite clear that all these trials, purges and liquidations which at the time seemed harsh, and shocked the whole world so much, were part of a decisive and energetic effort on the part of Stalin’s Government to protect itself not only from a *coup d’état* from within but also from an attack from without. The purge established order in the country and freedom from treason.”

<sup>1091</sup> Joseph E. Davies, *Mission to Moscow* (New York: Simon and Schuster, 1941).

<sup>1092</sup> Jacob Heilbrunn, “The *New York Times* and the Moscow Show Trials,” *World Affairs* 153 (3) (1991): 87-101, 98. Stalin ordered the showing of the film throughout the Soviet Union.

<sup>1093</sup> This section of the film is publicly available on You Tube as parts 6 and 7 of “Mission to Moscow.” The trial scene begins at 3:03 of part 6. See <http://www.youtube.com/watch?v=lufRqSJY-qA&NR=1> and <http://www.youtube.com/watch?v=eoO8eyPNeH8&feature=related>.

<sup>1094</sup> Davies’ opinion notwithstanding, the Rand Corporation published a detailed analysis in 1954 of the inconspicuous verbal techniques used by the defendants to communicate to insiders the falsity of their putative confessions. Leites, Nathan and Elsa Bernaut, *Ritual of Liquidation: The Case of the Moscow Trials* (Glencoe, IL: Free, 1954) 278-336.

<sup>1095</sup> Clayton R. Koppes and Gregory D. Black, *Hollywood Goes to War* (New York: Free Press, 1987) 205.

knowledge of their false presentation.”<sup>1096</sup>

### **B. Persuading Dewey to Serve**

Although the exiled Trotsky vigorously denounced the Moscow Trials, his denunciations received little credence, and his refutations failed to sway liberal-to-left opinion in the United States. “Part of the problem was that Trotsky’s voice could barely be heard above the murderous din orchestrated in Moscow.”<sup>1097</sup> Shortly after the second Moscow Trial, on February 9, 1937, Trotsky attempted to speak by telephone from Mexico to a capacity crowd of more than 6,000 in New York’s Hippodrome. The crowd heard a few faint words in Russian, a loud click, and then a burst of static. Mexican sabotage prevented the crowd from hearing Trotsky’s voice that night.

<sup>1098</sup>

When attempts to reestablish the telephone connection failed, Max Shachtman read an English text of Trotsky’s speech. The conclusion expressed Trotsky’s desire to appear before a neutral commission of inquiry to answer the charges brought against him in Moscow. “If this commission decides that I am guilty of the slightest degree of the crimes which Stalin imputes to me,” Trotsky promised, “I pledge in advance to place myself voluntarily in the hands of the executioners of the G.P.U.”<sup>1099</sup>

Such a commission had been widely discussed, but it was uncertain whether it would come to reality. One man who sought to make it real was Sidney Hook, a former doctoral student of John Dewey. Hook found “something inherently incredible in the notion that most of the architects of ‘the great experiment’ - which still enjoyed high prestige in the West - were agents

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<sup>1096</sup> David Culbert, ed., *Mission to Moscow*, (Madison, WI: U of Wisconsin P, 1980)16-17. Regarding Davies, Bruckner commented, “I did not fully respect Mr. Davies’ integrity, both before, during and after the film.”

<sup>1097</sup> Bertrand Pautenaude, *Trotsky: Downfall of Revolutionary* (New York: HarperCollins, 2009) 35.

<sup>1098</sup> Bertrand Pautenaude, *Trotsky: Downfall of Revolutionary* (New York: HarperCollins, 2009) 36.

<sup>1099</sup> Bertrand Pautenaude, *Trotsky: Downfall of Revolutionary* (New York: HarperCollins, 2009) 37.

of the Western secret police.”<sup>1100</sup> Conversely, Hook worried that “if the bizarre court proceedings were a rigmarole played out for some dark punitive purpose of Stalin and his regime, the promise of socialism was revealed as a ghastly mockery of its great humanist ideals.”<sup>1101</sup>

Deciding that he “could not rest until the truth about the Moscow trials was known,” Hook worked to persuade his famous teacher Dewey to chair a neutral commission in Trotsky’s case. Dewey considered Trotsky’s case of equal importance to the Dreyfus affair and the trial of Sacco and Vanzetti,<sup>1102</sup> but he was reluctant to undertake such a task. Seventy-eight years old, Dewey was “weary, and desirous of being left alone,”<sup>1103</sup> and his family objected to his “dirtying his hands” in Communist politics. “Dewey’s reluctance also stemmed from the fact that, despite his métier and his interest in the Soviet Union, he had not studied Marxism nor paid much attention to Soviet politics.”<sup>1104</sup>

Nevertheless, to Trotsky’s delight, Hook finally persuaded Dewey to serve.<sup>1105</sup> Dewey’s decision to serve is a monument to his character, as his participation on the Commission isolated him from many long-time friends and associates. Dewey explained that a major factor in his acquiescence to Hook’s requests was “the campaign of harassment and intimidation aimed at dissuading him.”<sup>1106</sup> The *New Republic*, for example, ran editorials arguing that the Moscow

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<sup>1100</sup> Sidney Hook, “Memories of the Moscow Trials,” *Commentary* 77(3) (1984): 57-63, 58.

<sup>1101</sup> Sidney Hook, “Memories of the Moscow Trials,” *Commentary* 77(3) (1984): 57-63, 58.

<sup>1102</sup> Dewey voiced this opinion at the March 1, 1938, meeting of the “Committee for the Defense of Leon Trotsky.” Bertrand Pautenaude, *Trotsky: Downfall of Revolutionary* (New York: HarperCollins, 2009) 38.

<sup>1103</sup> Sidney Hook, “Memories of the Moscow Trials,” *Commentary* 77(3) (1984): 57-63, 59.

<sup>1104</sup> Bertrand Pautenaude, *Trotsky: Downfall of Revolutionary* (New York: HarperCollins, 2009) 38.

<sup>1105</sup> Bertrand Pautenaude, *Trotsky: Downfall of Revolutionary* (New York: HarperCollins, 2009) 39. Dewey consented to Hook’s request on March 19, 1937. Trotsky described the day that he learned that Dewey was coming to Mexico as “a great holiday in my life.”

<sup>1106</sup> Bertrand Pautenaude, *Trotsky: Downfall of Revolutionary* (New York: HarperCollins, 2009) 39.

Trials were legitimate and opposed Dewey's participation on the Commission.<sup>1107</sup> Dewey also stated that declining the chairmanship of the Commission “would be false to my lifework.”<sup>1108</sup>

On May 26, 1937, Dewey sent a letter to *New Republic* editor Bruce Bliven repudiating the *New Republic's* editorial campaign against a public hearing for Trotsky.<sup>1109</sup> “I cannot understand how the Journal which identified liberalism with the spirit of full and free discussion could take the attitude of belittling in advance the attempt to give Mr. Trotsky a full opportunity for hearing,” wrote Dewey. Dewey complained further that the *New Republic* had “unconsciously if not deliberately” repeated “the familiar attitude of the Communist Party in saying that some members of the Inquiry are Trotskyites. Unless believing that Trotsky has a right to a hearing is proof of being a Trotskyite, no member of the Inquiry, including the 5 men on the French sub-commission,<sup>1110</sup> is or ever has been a Trotskyite.” In protest, Dewey refused to write for the *New Republic* ever again.<sup>1111</sup>

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<sup>1107</sup> See Malcolm Cowley, “The Trial of the Trotskyites in Russia,” *The New Republic*, 2 September 1936: 88-89; Malcolm Cowley, “Review of *The Case of the Anti-Soviet Trotskyite Center*, by G.L. Piatakov,” *The New Republic*, 7 April 1937: 276-70. Even though Dewey was a founder of the *New Republic*, the magazine forced Dewey to resign from its editorial board. Will Reissner, “Introduction,” *Not Guilty: Report of the Commission of Inquiry into the Charges Made against Leon Trotsky in the Moscow Trials*, 2<sup>nd</sup> ed. (New York: Monad, 1972) ix.

<sup>1108</sup> Dewey Commission, *The Case of Leon Trotsky: Transcript of Proceedings in the Hearings of the Preliminary Commission of Inquiry into the Charges Made against Leon Trotsky in the Moscow Trials Held April 10-17, 1937* (New York: Merit, 1968) 5: “Speaking, finally, not for the Commission, but for myself, I had hoped that a chairman might be found for these preliminary investigations whose experience better fitted him for the difficult and delicate task to be performed. But I have given my life to the work of education, which I have conceived to be that of public enlightenment in the interests of society. If I finally accepted the responsible post I now occupy, it was because I realized that to act otherwise would be false to my lifework.”

<sup>1109</sup> John Dewey, letter to Bruce Bliven, 26 May 1937, Sidney Hook Collection of John Dewey, 1926-1972, Southern Illinois University Special Collections Research Center, Carbondale, Illinois.

<sup>1110</sup> The Dewey Commission held hearings through three sub-commissions. One of these was the rogatory sub-commission or “Commission Rogatoire” created by the Comité pour l'enquête sur le Procès de Moscou'. The Commission Rogatoire took the testimony of Trotsky's son Leon Sedov and four other witnesses during eleven sessions held in Paris from May 12 to June 22, 1937.

<sup>1111</sup> Christopher Phelps, *Young Sidney Hook: Marxist and Pragmatist* (Ann Arbor: U Michigan P, 2005) 158.



The next step for Hook was recruiting members of the Commission of Inquiry. Opponents leveled a barrage of hostile propaganda against the proposed Commission. This pressure was “manifest most forcibly through the periphery of the Communist Party, which upheld Moscow's version of the trials, but it was also reflected in organs of liberal opinion such as the *New Republic* and the *Nation*.”<sup>1112</sup> An “Open Letter to American Liberals” urging a boycott of the Commission of Inquiry was published in *Soviet Russia Today* and circulated widely in the United States.<sup>1113</sup> It warned “all men of goodwill” to withhold any assistance to the Commission. The Open Letter characterized critics of the Moscow Trials as interfering in domestic Soviet affairs, giving aid and comfort to “fascist forces throughout the world,” and “dealing a blow to the forces of progress.”<sup>1114</sup> Eighty-eight professors, writers, and artists signed the Open Letter, including Theodore Dreiser, Lillian Hellman, Max Lerner, Dorothy Parker, and Nathanael West.<sup>1115</sup>

Despite an “aggressive hostility on the part of a sizable component of the New York intellectual milieu in which it was initiated,” Dewey and Hook “were able to put together a group of persons well enough known in the liberal community to command respect.”<sup>1116</sup> On

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<sup>1112</sup> Alan Wald, “Memories of the John Dewey Commission: Forty Years Later,” *Antioch Review* 35 (4) (1977): 438-51, 442.

<sup>1113</sup> Corliss Lamont, “An Open Letter to American Liberals,” *Soviet Russia Today*, March, 1937: 14-15.

<sup>1114</sup> Will Reissner, “Introduction,” *Not Guilty: Report of the Commission of Inquiry into the Charges Made against Leon Trotsky in the Moscow Trials*, 2<sup>nd</sup> ed. (New York: Monad, 1972) ix.

<sup>1115</sup> Will Reissner, “Introduction,” *Not Guilty: Report of the Commission of Inquiry into the Charges Made against Leon Trotsky in the Moscow Trials*, 2<sup>nd</sup> ed. (New York: Monad, 1972) ix; Alan Wald, “Memories of the John Dewey Commission: Forty Years Later,” *Antioch Review* 35 (4) (1977): 438-51, 442.

<sup>1116</sup> Sidney Hook, “Memories of the Moscow Trials,” *Commentary* 77(3) (1984): 57-63, 59. The members included John Dewey, Professor Emeritus Of Philosophy at Columbia University; John P. Chamberlain, author, journalist, and associate editor of the *Saturday Review Of Literature*; Alfred Rosmer, a member of the Executive Committee of the Communist International; Edward Alsworth Ross, Professor Emeritus of Sociology at the University of Wisconsin; Otto Ruehle, a biographer of Karl Marx and leader of the Saxon Revolution in 1918; Benjamin Stolberg, author and labor journalist; Wendelin Thomas, leader of the Wilhelmshaven revolt and former Communist member of the Reichstag; Carlo Tresca, “Anarcho-Syndicalist” leader active in the Sacco-Vanzetti Defense; Francisco Zamora, Latin American left publicist;

April 2, 1937, five members of Dewey's Commission of Inquiry boarded the Sunshine Express for Mexico City.<sup>1117</sup> The world would finally hear Trotsky's voice.

### C. Procedure of the Dewey Commission

The Dewey Commission conducted its activities after the second Moscow Trial of January 23-30, 1937, but before the third Moscow Trial of March 2-13, 1938. Three sub-commissions took testimony. The first sub-commission, the "Preliminary Commission," held thirteen hearings in Coyoacan, Mexico from April 10 to April 17, 1937.<sup>1118</sup> Chaired by Dewey, the Preliminary Commission heard testimony from Trotsky and his secretary Jan Frankel regarding the Soviet charges against Trotsky and Trotsky's counter-charges against the Soviet government.<sup>1119</sup>

The second sub-commission, the "Commission Rogatoire" created by the Comité pour l'enquête sur le Procès de Moscou', held eleven sessions in Paris from May 12 to June 22, 1937. The Commission Rogatoire took the testimony of Trotsky's son Leon Sedov and four other

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and Suzanne La Follette, author, journalist, and former editor of *The Freeman* and *The New Freeman*. John F. Finnerty, former counsel for Sacco and Vanzetti, served as counsel for the Commission. Carleton Beals, a journalist specializing in Latin American affairs, resigned on April 16, 1937, after the eleventh session in Mexico. Mr. Albert Goldman, a Chicago labor attorney, acted as counsel for Leon Trotsky.

<sup>1117</sup> Bertrand Pautenaude, *Trotsky: Downfall of Revolutionary* (New York: HarperCollins, 2009) 40. Dewey originally planned to request a US visa for Trotsky so that Trotsky could testify before the Commission in New York. The slight prospect of success and the press of time, however, prompted the decision to send a five-member "preliminary commission" to Mexico under Dewey's leadership to take Trotsky's testimony. *Id.* at 39.

<sup>1118</sup> The five members of the Preliminary Commission included John Dewey, Carleton Beals, Suzanne LaFollette, Otto Ruehle, and Benjamin Stolberg. John F. Finerty acted as counsel for the Preliminary Commission. Finerty was the former counsel for Sacco and Vanzetti. Chicago labor attorney Robert Goldman acted as counsel for Leon Trotsky.

<sup>1119</sup> The transcript of the Preliminary Commission's hearings is published as Dewey Commission, *The Case of Leon Trotsky: Transcript of Proceedings in the Hearings of the Preliminary Commission of Inquiry into the Charges Made against Leon Trotsky in the Moscow Trials Held April 10-17, 1937* (New York: Merit, 1968). The Preliminary Commission invited the Soviet government to appear at its sessions with the right to cross-examine witnesses and offer evidence and rebuttal of their testimony. The Preliminary Commission also requested the Soviet government to provide the records of the preliminary hearings to the first two Moscow Trials. The invitees ignored these requests. Dewey Commission, *Not Guilty: Report of the Commission of Inquiry into the Charges Made against Leon Trotsky in the Moscow Trials*, 2<sup>nd</sup> ed. (New York: Monad, 1972) 7.

witnesses.<sup>1120</sup> The third sub-commission took testimony in New York from eleven witnesses in five hearings on July 26 and July 27, 1937.<sup>1121</sup> The Dewey Commission issued its findings on September 21, 1937.

The Military Collegium convicted Trotsky and Sedov *in absentia* in the first two Moscow Trials. The main goal of the Dewey Commission was to provide a neutral forum for Trotsky to present his case. The Dewey Commission achieved this goal despite the remarkable propaganda campaign waged against it and despite lacking the power to compel testimony and the production of evidence. In the process, the Dewey Commission exposed remarkable contradictions in the Soviet Government's fabricated evidence.

Nevertheless, the *findings* of the Dewey Commission are subject to three criticisms. First, since the Dewey Commission did not possess the full powers of a court of law, *it could not conduct a truly adversary proceeding*. Although the Dewey Commission invited the Soviet Government and other parties adverse to Trotsky to attend the proceedings, cross-examine witnesses, and offer evidence, they uniformly declined.<sup>1122</sup> The Dewey Commission described its procedure as similar to a Senate investigating committee and the National Labor Relations

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<sup>1120</sup> The four other witnesses were Victor Serge, Eugene Bauer, Franz Pfemfert, and Alexandra Pfemfert. Dewey Commission, *Not Guilty: Report of the Commission of Inquiry into the Charges Made against Leon Trotsky in the Moscow Trials*, 2<sup>nd</sup> ed. (New York: Monad, 1972) 396.

<sup>1121</sup> These eleven witnesses were Esther Field, B. J. Field, A. J. Muste, Sara Weber, Max Schachtman, Herbert Solow, Max Sterling, Davis Herron, Harold Isaacs, and Viola Robinson. Dewey Commission, *Not Guilty: Report of the Commission of Inquiry into the Charges Made against Leon Trotsky in the Moscow Trials*, 2<sup>nd</sup> ed. (New York: Monad, 1972) 396.

<sup>1122</sup> Both the Preliminary Commission in Mexico and the Commission Rogatoire in Paris invited the Soviet government to appear at its sessions with the right to cross-examine witnesses and offer evidence and rebuttal of the witnesses' testimony. The Preliminary Commission also invited the Communist Party of the US, the Communist Party of Mexico, the well-known communist lawyer Mr. Joseph Brodsky of New York, and Mr. Lombardo Toledano, the General Secretary of the Confereracion de Trabajadores de Mexico and a well-known opponent of Trotsky to participate in its inquiry. The Commission Rogatoire issued similar invitations to the French Communist Party, the Friends of the USSR, and the League for the Rights of Man. Lastly, the Preliminary Commission requested the Soviet government to provide the records of the preliminary hearings to the first two Moscow Trials. The invitees ignored all these requests. Dewey Commission, *Not Guilty: Report of the Commission of Inquiry into the Charges Made against Leon Trotsky in the Moscow Trials*, 2<sup>nd</sup> ed. (New York: Monad, 1972) 7.

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Second, since the Dewey Commission did not have the power to compel production of evidence from the Soviet government, much of *the documentary evidence supporting the Commission's findings lacked the indicia of reliability usually required for admission*. Five of the 34 exhibits were publications authored by Trotsky himself, and eight more were publications about Trotsky. The Commission accepted no fewer than 69 affidavits into evidence.<sup>1124</sup> All these documents constituted inadmissible hearsay since they consisted of out-of-court assertions offered as evidence of the truth of their contents.<sup>1125</sup>

Third, *the cross-examinations of the witnesses, particularly Trotsky, were wholly inadequate*. Commission Counsel John Finerty bears responsibility for this shortcoming. The Dewey Commission recognized the importance of cross-examination in its final report: “In the absence of any representative of the prosecution, an increased burden of cross examining witnesses fell upon the members of the sub-commissions and their counsel.”<sup>1126</sup> Nevertheless, Commission Counsel John Finerty obstructed questions impeaching Trotsky's direct testimony by threatening to resign if the Commission permitted them. Finerty also advised the Committee,

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<sup>1123</sup> Dewey Commission, Dewey Commission, *Not Guilty: Report of the Commission of Inquiry into the Charges Made against Leon Trotsky in the Moscow Trials*, 2<sup>nd</sup> ed. (New York: Monad, 1972) 6.

<sup>1124</sup> Dewey Commission, *The Case of Leon Trotsky: Transcript of Proceedings in the Hearings of the Preliminary Commission of Inquiry into the Charges Made against Leon Trotsky in the Moscow Trials Held April 10-17, 1937* (New York: Merit, 1968) xix-xx.

<sup>1125</sup> The Commission's legal counsel John F. Finerty failed to provide adequate evidentiary guidance to the Committee. The following erroneous statement appears on page 6 of the final report: “In accepting evidence [this Commission] has been guided by the so-called 'best evidence rule,' under which it has received only the best evidence which the circumstances made available.” Dewey Commission, *The Case of Leon Trotsky: Transcript of Proceedings in the Hearings of the Preliminary Commission of Inquiry into the Charges Made against Leon Trotsky in the Moscow Trials Held April 10-17, 1937* (New York: Merit, 1968) 6. The best evidence rule has *nothing* to do with what evidence is *available*. The best evidence rule, also known as the original document rule, requires instead that the party offering documentary evidence must present the *original* document to the court for the court to accept the document into evidence.

<sup>1126</sup> Dewey Commission, Dewey Commission, *Not Guilty: Report of the Commission of Inquiry into the Charges Made against Leon Trotsky in the Moscow Trials*, 2<sup>nd</sup> ed. (New York: Monad, 1972) 8.

erroneously, that such questions “were highly improper” and “would be sufficient cause for mistrial in any ordinary court.”<sup>1127</sup>

One of the members of the Preliminary Commission, Carleton Beals, resigned in protest at the responses he claimed to receive from Trotsky, his fellow Commission members, and the Commission's counsel Finerty regarding a line of questions he posed to Trotsky in Mexico on April 16, 1937.<sup>1128</sup> According to Beals, the Commission abandoned its original plan to take up the various aspects of the case topically and cross-examine on each section of the evidence. Instead, the Commission decided to permit Trotsky to complete his entire defense before allowing cross-examination. Furthermore, each Commissioner was required to submit his written

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<sup>1127</sup> Dewey Commission, *The Case of Leon Trotsky: Transcript of Proceedings in the Hearings of the Preliminary Commission of Inquiry into the Charges Made against Leon Trotsky in the Moscow Trials Held April 10-17, 1937* (New York: Merit, 1968) xxv. In view of Trotsky's denial that Stalin promoted his theory of “socialism in one country” prior to the fall of 1924 (pp. 411-412), Carleton Beals asked a series of questions in the eleventh session indicating that Alexander Borodin was sent to Mexico as Trotsky's emissary in 1919 to secretly found the Communist Party of Mexico. During this trip, according to Beals, Borodin referred to the controversy regarding socialism in one country as early as 1919 or 1920, 4 to 5 years earlier than Trotsky claimed. Beals then asked the following question: “To what extent, when you were part of the Soviet government, did you attempt to promote or inspire revolutionary activities in other countries?” Finerty advised the Preliminary Commission that this question would be sufficient cause for mistrial in any ordinary court, and that he could not continue as counsel if the Commission permitted such questions in the future (pp. xxv-xxvi). Finerty's legal evaluation of this question as grounds for mistrial is ludicrous. Beals' questions directly impeached Trotsky's prior direct testimony, and impeachment of prior testimony is the very essence of cross-examination. Furthermore, the questions were clearly relevant and probative to the Commission's inquiry as to whether Trotsky was guilty of the charges brought against him in the Moscow Trials. The allegations against Trotsky in the second Moscow Trial centered on allegations of international conspiracy by Trotsky with Germany and Japan. The transcript of this exchange appears in Dewey Commission, *The Case of Leon Trotsky: Transcript of Proceedings in the Hearings of the Preliminary Commission of Inquiry into the Charges Made against Leon Trotsky in the Moscow Trials Held April 10-17, 1937* (New York: Merit, 1968) 411-14. For a discussion of this exchange from an author sympathetic to Trotsky, see Isaac Deutscher, *The Prophet Outcast: Trotsky, 1929-1940* (London: Verso, 2003) 304-05.

<sup>1128</sup> Beals' letter of resignation is contained in Dewey Commission, *The Case of Leon Trotsky: Transcript of Proceedings in the Hearings of the Preliminary Commission of Inquiry into the Charges Made against Leon Trotsky in the Moscow Trials Held April 10-17, 1937* (New York: Merit, 1968) 416-17. Dewey responded to Beals' resignation by stating: “I wish to make, on behalf of the Commission, a brief statement: In expressing their regret of the Preliminary Commission at Mr. Beals' resignation, I wish to say that Mr. Beals has been given full opportunity to ask questions. We are especially sorry that he is not here this morning to continue his personal cross-examination.” *Id.*

questions in advance to counsel for the Commission John F. Finerty.<sup>1129</sup>

The record corroborates Beals' claims, at least in part. Although there are intermittent questions from time to time throughout the sessions, no significant examination of Trotsky by anyone other than Trotsky's counsel Albert Goldman appears in the record until the tenth and eleventh sessions. In these late sessions, Commission Counsel John F. Finnerty asks most of the questions.

Even then, Finerty asks questions that *bolster* Trotsky's case rather than probe its weaknesses. Finerty even states on the record that he does *not* intend to treat Trotsky as a hostile witness, but only to ask questions "to develop facts that in my opinion are necessary for an intelligent conclusion by the Commission on the questions here involved." Finerty's questions were so solicitous that the *El Nacional* reported that Finerty was "Trotsky's friend" and serving as Trotsky's counsel.<sup>1130</sup>

Finerty's responsibility was to the Committee, not Trotsky. Finerty's failure to conduct a meaningful cross-examination unfairly compromised the ability of the Committee to evaluate the evidence fully and fairly when making its findings. Finerty's obstruction of Beals' attempted cross-examination also precipitated Beals' criticism in the *Saturday Evening Post* that the Commission was not conducting a serious inquiry.<sup>1131</sup>

#### **D. Findings of the Dewey Commission**

Despite these shortcomings, the Dewey Commission exposed many of the contradictions

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<sup>1129</sup> Carleton Beals, "The Fewer Outsiders the Better," *Saturday Evening Post*, 12 June 1937: 23, 74-78. Finerty would then decide what questions would be asked. Mr. Beals complained that he was not "content to let Mr. Finerty handle all the cross-examination. He had already shown himself pathetically gentle with Trotsky, he had hastened to put favorable words into Trotsky's mouth, and seemed to have little grasp of the case." *Id.*

<sup>1130</sup> Dewey Commission, *The Case of Leon Trotsky: Transcript of Proceedings in the Hearings of the Preliminary Commission of Inquiry into the Charges Made against Leon Trotsky in the Moscow Trials Held April 10-17, 1937* (New York: Merit, 1968) 344-45.

<sup>1131</sup> Carleton Beals, "The Fewer Outsiders the Better," *Saturday Evening Post*, 12 June 1937: 23, 74-78.

contained in the Soviet Government's fabricated evidence. One illustrative example of the contradictions in the evidence against the defendants involved the testimony of defendant E. S. Holtzman. Holtzman gave testimony in the first Moscow Trial regarding an alleged meeting with Trotsky's son Lev Sedov in Copenhagen.

Holtzman claimed that he acted as an intermediary between defendants Ivan Smirnov, Sedov, and Trotsky in furtherance of a conspiracy to murder Stalin. According to Holtzman, Trotsky maintained that "it was necessary to remove Stalin" in order to bring the Trotskyites to power.<sup>1132</sup> Holtzman testified on August 21, 1936, that he stayed in the Hotel Bristol in Copenhagen in December 1932. He met Sedov in the lounge of the Hotel Bristol before going to a meeting with Trotsky:

Sedov said to me: "As you are going to the USSR, it would be a good thing if you came with me to Copenhagen where my father is..." I agreed, but I told him that we could not go together for reasons of secrecy. I arranged with Sedov to be in Copenhagen within two or three days, to put up at the Hotel Bristol and meet him there. I went to the hotel straight from the station and in the lounge met Sedov. About 10 AM we went to see Trotsky.<sup>1133</sup>

The Military Collegium sentenced Holtzman to death on August 24, 1936,<sup>1134</sup> and Article 470 of the Criminal Code of 1936 required Holtzman's immediate execution.

Trotsky testified before the Preliminary Subcommittee that although he was in

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<sup>1132</sup> People's Commissariat of Justice of the USSR, *Report of Court Proceedings in the Case of the Trotskyite-Zinovievite Terrorist Centre Heard Before the Military Collegium of the Supreme Court of the U.S.S.R., Moscow, August 19-24, 1936* (New York: Fertig, 1967) 100.

<sup>1133</sup> Dewey Commission, *The Case of Leon Trotsky: Transcript of Proceedings in the Hearings of the Preliminary Commission of Inquiry into the Charges Made against Leon Trotsky in the Moscow Trials Held April 10-17, 1937* (New York: Merit, 1968) 146; People's Commissariat of Justice of the USSR, *Report of Court Proceedings in the Case of the Trotskyite-Zinovievite Terrorist Centre Heard Before the Military Collegium of the Supreme Court of the U.S.S.R., Moscow, August 19-24, 1936*. (New York: Fertig, 1967) 100.

<sup>1134</sup> People's Commissariat of Justice of the USSR, *Report of Court Proceedings in the Case of the Trotskyite-Zinovievite Terrorist Centre Heard Before the Military Collegium of the Supreme Court of the U.S.S.R., Moscow, August 19-24, 1936* (New York: Fertig, 1967) 179-180. Holtzman's final plea in the 1936 trial was as follows: "Here in the dock beside me, is a gang of murderers, not only murderers, but fascist murderers. I do not ask for mercy." *Id.* 172.

Copenhagen from November 23 to December 2, 1932, he never met Holtzman there. Trotsky also testified that Sedov was not in Copenhagen at the time. The testimony of Sedov and Trotsky's secretary Jan Frankel corroborated Trotsky's testimony.

One week after Holtzman's execution, an article appeared on the front page of a Danish newspaper that apparently corroborated Trotsky's testimony. This article explained that its owners demolished the Hotel Bristol in 1917, *fifteen years* before the meeting between Sedov and Holtzman allegedly took place.<sup>1135</sup>

Sedov denied inviting Holtzman to go to Copenhagen, and he further denied that he had ever been to Copenhagen. Sedov also provided considerable evidence that he was taking examinations at the Technische Hochschule in Berlin at that time. The testimony of four witnesses stated that they spoke daily with Sedov in Berlin during this period. Other corroborating evidence for Sedov's testimony included testimony of witnesses in Copenhagen who spoke by telephone with Sedov in Berlin, Sedov's attendance book from the Technische Hochschule in Berlin, and Sedov's passport.<sup>1136</sup>

The Dewey Commission concluded appropriately that Holtzman's testimony in the first Moscow Trial was false. Properly corroborated testimony established that Sedov was not in Copenhagen at the time of Trotsky's visit in November and December 1932. Holtzman did not meet Sedov in Copenhagen and go with him to meet Trotsky, and Holtzman did not meet with

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<sup>1135</sup> *Socialdemokraten*, 1 Sept. 1936, 1. *Socialdemokraten* was a publication of the Danish Social Democratic Party. This article and the extensive propaganda efforts by the Soviet government to explain away its claims are recounted in detail in Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 99-100; Robert Tucker, *Stalin in Power: The Revolution From Above 1928-1941* (New York: Norton, 1990) 372; and Simon Sebag Montefiore, *Stalin: The Court of the Red Tsar* (Phoenix: London, 2004) 170. The primary Soviet argument was that Holtzman stayed at another hotel that was near a Cafe Bristol.

<sup>1136</sup> Dewey Commission, Dewey Commission, *Not Guilty: Report of the Commission of Inquiry into the Charges Made against Leon Trotsky in the Moscow Trials*, 2<sup>nd</sup> ed. (New York: Monad, 1972) 76-96.



Trotsky in Copenhagen.<sup>1137</sup> Based on these and numerous other “inherent improbabilities” in the testimony of the Moscow defendants,<sup>1138</sup> the Dewey Commission reached the following findings:

- (1) The conduct of the Moscow trials was such as to convince any unprejudiced person that no effort was made to ascertain the truth.
- (2) While confessions are necessarily entitled to the most serious consideration, the confessions themselves contain such inherent improbabilities as to convince the Commission that they do not represent the truth, irrespective of any means used to obtain them...
- (22) We therefore find the Moscow trials to be frame-ups.
- (23) We therefore find Trotsky and Sedov not guilty.<sup>1139</sup>

## V. Evaluation of the Soviet Legal System

### A. The Soviet Legal System Satisfies Hart's Conditions for a Valid Legal System

As explained in Chapter II, Hart utilizes the external<sup>1140</sup> and internal points of view<sup>1141</sup> to explain the two conditions required for the existence of a valid legal system. The first condition is that private citizens generally obey the primary rules of obligation.<sup>1142</sup> It is sufficient that each member of the population obeys the primary rules “for his part only” and “from any

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<sup>1137</sup> Dewey Commission, *Dewey Commission, Not Guilty: Report of the Commission of Inquiry into the Charges Made against Leon Trotsky in the Moscow Trials*, 2<sup>nd</sup> ed. (New York: Monad, 1972) 96.

<sup>1138</sup> The Dewey Commission also adduced persuasive evidence to the falsity of the following important claims by the prosecution in the Moscow trials: (1) that Georgy Piatakov, an Old Bolshevik, took an airplane flight on December 12, 1935 from Berlin to Oslo to visit Trotsky at the Hotel Bristol in Oslo for purposes of furthering Trotsky's conspiracy; (2) that a relationship existed between Lev Sedov and German industrialists, including an alleged “kick-back” arrangement; and (3) that Trotsky was deeply involved in the murder of Kirov. See Dewey Commission, *Not Guilty: Report of the Commission of Inquiry into the Charges Made against Leon Trotsky in the Moscow Trials*, 2<sup>nd</sup> ed. (New York: Monad, 1972) 247-319.

<sup>1139</sup> Dewey Commission, *Not Guilty: Report of the Commission of Inquiry into the Charges Made against Leon Trotsky in the Moscow Trials*, 2<sup>nd</sup> ed. (New York: Monad, 1972) xxi, xxiii.

<sup>1140</sup> The *external point of view* is the view of a person who feels no obligation that he “should” follow the law. H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 56.

<sup>1141</sup> The *internal point of view*, on the other hand, is the view of a person who feels obligated to follow the law. H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 56-57.

<sup>1142</sup> A *primary rule* is a rule that imposes an obligation or a duty. “[P]rimary rules are concerned with the actions that individuals must or must not do.” Examples of primary rules include torts and criminal laws. H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 91.

motive whatsoever.” In Hart’s terminology, it is *sufficient* that *citizens* take an *external* point of view toward *primary* rules.<sup>1143</sup> Soviet citizens generally obeyed the primary rules of obligation. The Soviet legal system therefore satisfies Hart’s first condition for a valid legal system.

The second condition for the existence of a valid legal system under Hart’s positivism is that public officials adopt the rule of recognition as their “public standard of official behavior.”<sup>1144</sup> Officials must feel themselves obligated to adopt and abide by the rule of recognition, and they must censure those public officials who fail to do so. In Hart’s terms, it is a minimum *necessary* condition that *officials* take the *internal* point of view toward *secondary* rules.<sup>1145</sup>

The Soviet legal system satisfies Hart’s second condition for legal validity. Soviet officials clearly felt themselves obligated to adopt and abide by the applicable rule of recognition, which often equated to the will of Lenin or Stalin. Soviet officials rarely challenged the legal validity or enforceability of their decrees. Officials ruthlessly censured any who did. It is indeed difficult to imagine a legal system with more aggressive censure of public officials than the censures imposed during Stalin’s Great Terror.

## **B. The Lessons of the Soviet Experience**

Since legal validity determines the enforceability of law, the standard for legal validity presents a fundamental issue for any legal system. The experience of the English Revolution of 1603-1701 established the necessity of autonomy and consent in determining legal validity. The trial of Socrates, however, revealed that autonomy and consent are insufficient by themselves to

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<sup>1143</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 116.

<sup>1144</sup> The rule of recognition provides “a rule for conclusive identification of the primary rules of obligation,” and it serves as Hart’s ultimate criterion for the validity of law. H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 94-95, 105. A rule is legally valid, and therefore enforceable, if it conforms to the requirements set forth in the rule of recognition. *Id.* at 103.

<sup>1145</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) 117.

provide an acceptable standard of legal validity. The trial of Socrates established that a principle of reason incorporating procedural due process is also required to protect against (1) the tyranny of the majority and (2) the conviction and punishment of the innocent. The Galileo Affair, like the trial of Socrates, confirms the necessity of procedural due process protections to protect the innocent from conviction.

The Moscow trials and the Soviet legal experience demonstrate two additional requirements for the principle of reason. The first is the requirement that *legal systems must recognize and treat their subjects as rational beings with a free will*. The second is the requirement of *substantive due process*. Laws must provide reliable guideposts by which people, as rational beings with free wills, may themselves orient their behavior and achieve a society based on ordered liberty.

### **C. Respect for Human Beings as Rational Creatures with Free Will**

Unless a legal system respects the status of human beings as a rational creature with a free will, it will not treat its subjects as ends in themselves. Following Aristotle's views on praise and blame, the Western tradition only assigns criminal blame if the defendant is guilty of *both* an *actus reus*, a wrongful act, and a *mens rea*, the voluntary intention to commit that act. Punishment is justified by the intentional decision of the defendant to commit the criminal act.

Soviet legal theory rejected this traditional view of criminal law. Beginning with the 1922 Criminal Code, Soviet legal theorists adopted a deterministic view of man that depicted human beings as the involuntary products of their economic conditions. Soviet legal theorists accordingly viewed crime, not as an intentional wrongful act, but as a social phenomenon produced by social circumstances.

These new views of man's nature and the nature of crime led Soviet legal theorists to make four significant departures from the traditional principles of Western criminal law. First,

Soviet law abandoned *the traditional requirements of actus reus and mens rea for criminal liability*. “Social dangerousness” became the new grounds for criminal liability.

Second, Soviet law abandoned the *traditional concept of punishment*. Soviet legal theorists rejected the traditional views of punishment, retribution, or expiation. Instead, they considered judicial penalties as “measures of social defense.”

Third, Soviet law institutionalized the *punishment of the innocent*. Soviet law authorized the punishment of a subject in the absence of any criminal conduct or intent, so long as authorities perceived the subject as a threat of “social danger.”

Lastly, Soviet law adopted *the doctrine of “crime by analogy.”* Abandoning the traditional western principle of “no crime, no punishment without a previous law,” the 1926 criminal code permitted punishment for an act even if the act was *not* prohibited by law. Soviet courts simply based convictions on “analogous” statutes.

The Soviet legal system produced by these departures enabled Stalin's government to execute, without any meaningful trial, an estimated 2,200,000 Russians during the Great Terror.<sup>1146</sup> The Soviet legal system did not regard its subjects as ends in themselves. By design, the Soviet legal system treated every subject as the means to a political end.

#### **D. Laws Must Provide *Substantive Due Process***

The status of human beings as rational beings with free wills entitles individuals to orient their *own* behavior to achieve a society based on ordered liberty. Law performs the essential function of providing general rules by which people may orient their own behavior. In

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<sup>1146</sup> Utilizing data released in 1987-1989 during Gorbachev's *glasnost*, historian Robert Conquest estimates that Stalin's agents arrested 8 million Russians during the Great Terror. Stalin's agents executed an estimated 1.5 million of these. Approximately 2 million died in camps, 600,000 to 700,000 by execution. At the end of the Terror, approximately 1 million remained in prisons, and the camp population had increased from 5 million to 8 million. Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 484-86.

order to accomplish this function, laws must serve as dependable guideposts. One such guidepost is that the law will not punish innocent parties.

Lon Fuller sets out eight principles that illustrate the requirements for dependable guideposts in substantive law.<sup>1147</sup> Together, these eight principles ensure that a legal system provides *substantive due process* to its subjects. First, society must state its laws in general terms in a manner that guarantees due process. Criminal statutes, for example, must give fair warning of the prohibited conduct and the penalty for the prohibited conduct.

Second, society must promulgate its laws publicly. Third, society must not apply its laws retroactively. Fourth, society must express its laws in understandable terms. Fifth, laws must be consistent with one another. Sixth, laws must not render compliance impossible by requiring conduct beyond the powers of the affected parties.

Seventh, laws must be steady over time. They must not be changed so frequently that the subjects cannot rely upon them. Lastly, society must apply its laws in a manner consistent with their wording. As explained in the following chapter, the Soviet legal system law violated all eight of these principles.

### **E. A New Standard for Legal Validity**

In conclusion, by applying the experimental method to evaluate legal principles by their effects and the social consequences they produce, we can now state a new standard for legal validity. This standard of validity requires legal systems to treat their subjects as ends in themselves. Legal systems that consistently treat their subjects as means to other ends may manifest the judicial power of the state, but they are not valid legal systems. They become arbitrary and unjust, destabilizing the societies that suffer their injustice

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<sup>1147</sup> Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964) 38-39.

The principles of *reason*, *consent*, and *autonomy* ensure that legal systems treat their subjects as ends in themselves. The principle of reason recognizes that every subject is a rational creature with a free will. The requirements of *procedural due process* protect against the punishment of the innocent and the tyranny of the majority. Legal systems that respect their subjects' status as ends in themselves permit their subjects to orient their own behavior. The requirements of *substantive due process* ensure that laws provide dependable guideposts to individuals in orienting their behavior.

The principle of consent provides that the legitimacy of law derives from the consent of those subject to its power. Common law custom, the doctrine of *stare decisis*, and legislation sanctioned by the subjects' legitimate representatives all evidence consent.

The principle of autonomy establishes the authority of law. Laws wield supremacy over political rulers. Political rulers are subject to the same law as the citizenry at large. Lastly, political rulers may not arbitrarily alter the law to accord to their will.

Although this standard of legal validity consists of three principles, each principle is indivisible from the other two. The foundation concept of each principle connects to the foundation concepts of the other two principles, just as each corner of a triangle connects to the other two corners. Each of these principles recognizes that every individual is a rational creature with a free will, and each seeks a legal system that treats all of its subjects as ends in themselves.

The following chapter evaluates the legal systems of ancient Athens, the Congregation of the Holy Office, and Soviet Russia under this validity standard.

## CHAPTER VI

### CONCLUSION: A NEW STANDARD FOR LEGAL VALIDITY

“But if someone really thinks, in advance, that it is open to question whether such an action as procuring the judicial execution of the innocent should be quite excluded from consideration—I do not want to argue with him; he shows a corrupt mind.”

G. E. M. Anscombe, “Modern Moral Philosophy,” 1958

#### I. A New Standard for Legal Validity

This dissertation formulates a new standard for legal validity that requires legal systems to treat their subjects as ends in themselves. Legal systems that consistently treat their subjects as means to other ends may manifest the judicial power of the state, but they are not valid legal systems. As demonstrated in the foregoing chapters, these legal systems inevitably become arbitrary, unjust, and destabilizing to their client societies. The history of law in the Western tradition is thus a history of revolution.

In formulating this new standard of legal validity, this dissertation rejects the inconsistencies and uncertainties inherent in natural law theory.<sup>1148</sup> It also rejects the narrow linguistic methodology of legal positivism that commits the analytic fallacy, separates law from its application, and thus produces an incomplete model of law.<sup>1149</sup>

In their stead, this dissertation adopts a pragmatic methodology that develops a standard for legal validity based on practical experience. This approach focuses on the operations of law and its effects upon ongoing human activities, and it evaluates legal principles by applying the experimental method to the social consequences they produce.<sup>1150</sup> Because legal history

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<sup>1148</sup> See discussion in text at pages 1-2, *supra*.

<sup>1149</sup> See discussion in text at pages 2-4, *supra*.

<sup>1150</sup> John Dewey, “My Philosophy of Law,” *The Great Legal Philosophers*, ed. Clarence Morris (Philadelphia: University Of Pennsylvania Press, 1959) 508-10.

provides a long record of past experimentation with legal principles, legal history is an essential feature of this method.<sup>1151</sup>

The experience of the English Revolution of 1603-1701 established the necessity of the principles of *autonomy* and *consent* in determining legal validity.<sup>1152</sup> The trial of Socrates, however, revealed that autonomy and consent are insufficient by themselves to provide an acceptable standard of legal validity. The trial of Socrates established that a principle of *reason* incorporating *procedural due process* is also required to protect against the punishment of the innocent and the tyranny of the majority.<sup>1153</sup>

The Galileo Affair, like the trial of Socrates, confirms the necessity of procedural due process protections to protect the innocent from conviction.<sup>1154</sup> The Moscow trials and the Soviet legal experience demonstrate two additional requirements for the principle of reason. The first is the requirement that legal systems *respect the status of their subjects as rational beings with a free will*. The second is the requirement of *substantive due process*. Laws must provide reliable guideposts by which people, as rational beings with free wills, may orient their own behavior in a society based on ordered liberty.<sup>1155</sup>

The consequences produced by the legal principles involved in the English Revolution and the trials of Socrates, Galileo, and Trotsky demonstrate that legal systems will not treat their subjects as ends in themselves unless their laws satisfy three principles. I therefore adopt these three principles to form a new standard for legal validity. The first principle, the *principle of reason*, requires legal systems to recognize that every subject is a rational creature with a free

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<sup>1151</sup> John Dewey, *Human Nature and Conduct: An Introduction to Social Psychology* (New York: Random House, 1930) 221.

<sup>1152</sup> See discussion in text at pages 45-48, *supra*.

<sup>1153</sup> See discussion in text at pages 177-79, *supra*.

<sup>1154</sup> See discussion in text at pages 233-34, *supra*.

<sup>1155</sup> See discussion in text at pages 290-93, *supra*.



will. The principle of reason also requires *procedural due process* to protect against the punishment of the innocent and the tyranny of the majority. Legal systems that respect their subjects' status as rational creatures with free wills permit their subjects to orient their own behavior. The principle of reason therefore requires *substantive due process* to ensure that laws provide dependable guideposts to individuals in orienting their behavior.

The second principle, the *principle of consent*, provides that the legitimacy of law derives from the consent of those subject to its power. Common law custom, the doctrine of *stare decisis*, and legislation sanctioned by the subjects' legitimate representatives all evidence consent.

The third principle, the *principle of autonomy*, establishes the authority of law. Laws must wield supremacy over political rulers. Political rulers must be subject to the same law as the citizenry at large. Lastly, political rulers may not arbitrarily alter the law to accord to their will.

Although the laws in the trials of Socrates, Galileo, and Trotsky satisfied all of legal positivism's requirements for legal validity,<sup>1156</sup> they did not satisfy any of the requirements in our new standard of legal validity. Consequently, each trial convicted an innocent man. The following discussion explains how Athenian law, canon law, and Soviet law violated the principles of reason, consent, and autonomy.

## **II. The Principle of Reason**

The principle of reason makes three demands of a legal system. First, its laws must respect the status of every subject as a rational creature with a free will. Second, its laws must incorporate *procedural due process* protections against the punishment of the innocent and the tyranny of the majority. Third, its laws must satisfy the demands of *substantive due process* by

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<sup>1156</sup> See discussion in text at pages 176-77, 231-32, and 289-90, *supra*.

providing reliable guideposts by which people, as rational creatures with free wills, may orient their own behavior in a society based on ordered liberty.

### **A. Procedural Due Process**

*Procedural due process* protections are required to protect against convicting the innocent and the tyranny of the majority. These guarantees generally function by achieving a balance between the state's ability to prosecute its subjects and the subjects' ability to defend themselves. Procedural due process, at a minimum, requires prior notice of the charges against the defendant and the potential penalties. It also requires a fair hearing before an impartial tribunal.

The procedural due process guarantees under the United States Constitution expand these protections to include the following nineteen enumerated rights and protections. The Fourth Amendment protects against (1) unreasonable searches and seizures and (2) requires search warrants based upon probable cause and (3) supported by oath or affirmation. The Fifth Amendment protects against arbitrary prosecution by (4) requiring grand jury indictments for civilian citizens. The Fifth Amendment protects all citizens against (5) double jeopardy and (6) being compelled to testify against themselves in criminal cases. The state cannot deprive any citizen of life, liberty, or property without due process of law, which requires (7) notice and (8) a fair hearing (9) before an impartial tribunal.

The Sixth Amendment requires that all criminal defendants receive (10) a speedy and (11) public trial by (12) an impartial jury in (13) a previously established district. The state must (14) inform all criminal defendants of the nature and cause of the accusation against them. All criminal defendants must (15) be allowed to confront all witnesses testifying against them, and all criminal defendants must (16) have compulsory process for obtaining witnesses in their favor. All criminal defendants must (17) have the assistance of counsel for their defense. The Eighth

Amendment prohibits the state from (18) unreasonably denying bail by requiring excessive bail and (19) forbids the infliction of cruel and unusual punishment, including punishment of the innocent.

### **B. Substantive Due Process**

Substantive due process requires that laws provide reliable guideposts by which people, as rational creatures with free wills, may orient their own behavior in a society based on ordered liberty. Lon Fuller sets out eight principles that illustrate the requirements for dependable guideposts in substantive law.<sup>1157</sup> First, society must state its laws in general terms in a manner that guarantees due process. Criminal statutes, for example, must give fair warning of the prohibited conduct and the penalty for the prohibited conduct.

Second, society must promulgate its laws publicly. Third, society must not apply its laws retroactively. Fourth, society must express its laws in understandable terms. Fifth, laws must be consistent with one another. Sixth, laws must not render compliance impossible by requiring conduct beyond the powers of the affected parties. Seventh, laws must be steady over time. They must not be changed so frequently that the subjects cannot rely upon them. Lastly, society must apply its laws in a manner consistent with their wording.

### **C. Athenian Law Violated the Principle of Reason**

The absence of adequate procedural due process protections in the Athenian legal system allowed the conviction of the innocent in *ostrakismos*, *graphe*, and *eisangelia* proceedings. With

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<sup>1157</sup> Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964) 38-39. Fuller presents his principles through the literary device of King Rex, a well-intentioned but incompetent king who violates these principles in formulating his laws. Each violation produces adverse consequences. Fuller also argues that these procedural principles of internal morality constrain the substantive norms of a system, since an evil legal system would have difficulty incorporating these principles. Lon L. Fuller, "Positivism and Fidelity to Law — A Reply to Professor Hart," 71 (4) *Harv. L. Rev.* (1958): 630-672, 661. See also Matthew Kramer, *Objectivity and the Rule of Law* (Cambridge: Cambridge University Press, 2007) 103-186.

regard to Athens' substantive law, the *graphai*, *ostrakismos*, and *eisangeliai* proceedings violated all eight of Fuller's principles listed immediately above.

These violations of the principle of reason combined to permit frivolous prosecutions for political purposes. The targets of prosecution were often those who contributed the most to Athens, as in the cases of Themistocles, the Areopagites, Pericles, Alcibiades, the Arginusae generals, and Socrates. The legal system treated these targeted individuals, not as ends in themselves, but as means to a political end.

### **1. Athenian Law Intentionally Punished the Innocent**

The most remarkable aspect of Athenian law was the *ostrakismos*, which permitted the *de jure* exile and killing of *innocent* subjects in the absence of *any* wrongdoing. Cleisthenes instituted *ostrakismos* as a means of preventing the revival of dictatorship, but it served this purpose for only three years.<sup>1158</sup> Because it lacked any due process protections against abuse, it quickly became the favored tool of the envious, the spiteful, and the politically ambitious.

The Athenian *ostrakismos* procedure provided none of the minimal due process protections of prior notice or a fair hearing before an impartial tribunal. First, the targeted subjects received no prior notice that they were the subject of an *ostrakismos* proceeding. Second, the targeted subject did not receive a fair hearing. There was no trial and no opportunity to address the *ekklesia* before voting. No evidence of wrongdoing was required, and the law provided no defense. The first vote was final, and no appeal was possible.

Third, the *ostrakismos* proceeding did not provide an impartial tribunal. Members of the *ekklesia* pursued their own self-interest, usually mitigation of their personal jealousies, in deciding the *ostrakismos*.<sup>1159</sup> In sum, *ostrakismos* permitted the exile and execution of innocent

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<sup>1158</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 30-31.

<sup>1159</sup> Plutarch, "Aristides," *Plutarch's Lives of Illustrious Men*, trans. John Dryden (Boston: Little, Brown,

subjects, for any motive whatsoever, with no judicial process.

Since *ostrakismos* required no evidence of wrongdoing and provided no due process protections, the *ekklesia* often made imprudent decisions that it later regretted.<sup>1160</sup> *Ostrakismos* did more than deprive Athens of her most talented leaders. *Ostrakismos* actually transformed its victims into some of Athens' most dangerous enemies.<sup>1161</sup>

## 2. Athenian Law Lacked Procedural Due Process Protections

The trial of Socrates, like all proceedings before the *heliaea*, lacked important procedural due process protections. The *heliaea* provided none of the minimal due process protections of prior notice and a fair hearing before an impartial tribunal.

First, defendants before the *heliaea* did not receive adequate prior notice. Although defendants like Socrates received notice of the nominal charges against them in an indictment prior to trial,<sup>1162</sup> the Athenian statutes were undefined and silent as to the penalty for their violation.<sup>1163</sup> Defendants therefore had no prior notice of either the prohibited conduct or the penalty for engaging in such conduct.

Second, defendants before the *heliaea* did not receive a fair hearing. The hearings were unfair for several reasons. Since the governing statutes were usually undefined, each *dikast* defined the crime and set the penalty anew in every case. Every *dikast* applied his newly defined

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1880) 230, 233, 506; Plutarch, "Themistocles," *Plutarch's Lives*, trans. Bernadotte Perrin (Cambridge: Harvard UP, 1914) 2; Diodorus Siculus, *The Historical Library of Diodorus*, trans. G. Booth, vol. 1 (London: McDowell, 1814) 404 (discussing the ostracism of Themistocles).

<sup>1160</sup> See discussion in text at page 133, *supra*.

<sup>1161</sup> See discussion in text at page 133, *supra*.

<sup>1162</sup> Plato, *The Trial and Death of Socrates: Four Dialogues*, trans. Benjamin Jowett (New York: Dover, 1992) 25; Plato and Xenophon, *Apologies*, trans. Mark Kremer (Newburyport, MA: Focus, 2006) 31; Diogenes Laertius, *The Lives and Opinions of the Eminent Philosophers*, trans. C.D. Yonge (London: Bell, 1901) 72.

<sup>1163</sup> The *asebeia* statute involved in Socrates' case stated as follows: "If anyone commits *asebeia*, let anyone who wishes submit a *graphe*." Douglas MacDowell, *The Law in Classical Athens* (London: Thames and Hudson, 1978) 129, 199.

law and newly determined penalty retroactively. There were no meaningful rules of evidence, and the litigants had no right to counsel. Every case was determined on an *ad hoc* basis without regard to precedent. The *heliaea* decided even capital cases in the heat of a single sitting, and there was no appeal from their decisions. The lack of procedural safeguards allowed *dikasts* to decide cases outside the charges and outside the evidence, as occurred in Socrates' case.

Third, the *heliaea* did not provide an impartial tribunal to decide the case. There was no presiding judge, and the evidence and arguments presented at trial were not limited to the charges stated in the indictment. Since the laws were undefined, each *dikast* sat as an interested legislator as well as a judge in each case. His partiality was unrestrained.

The universal standing of any citizen to sue public officials for malfeasance, combined with the absence of procedural safeguards for due process, invited the filing of *graphe* actions for purely political ends. Consequently, the *heliaea* were often political rather than judicial bodies in practice.<sup>1164</sup> Aristotle observes that the power of the *heliaea* changed the Athenian constitution into a direct democracy with “the people playing the tyrant.”<sup>1165</sup> The absence of procedural due process protections permitted the *dikasts*, *inter alia*, to convict Socrates on charges outside the indictment and for reasons outside the evidence.

### 3. Athenian Law Lacked Substantive Due Process

The principle of reason requires that the substantive rules of law provide dependable guideposts and provides eight requirements for such guideposts. The *asebeia* statute involved in Socrates' case gives no definition for *asebeia*, and it specifies no penalty. It simply provided as follows: “If anyone commits *asebeia*, let anyone who wishes submit a *graphe*.”<sup>1166</sup> As

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<sup>1164</sup> Robert J. Bonner, *Lawyers and Litigants in Ancient Athens* (New York: Benjamin Blom, 1969) 83.

<sup>1165</sup> Aristotle, *Politics*, trans. Benjamin Jowett (Toronto: Dover, 2000) 96.

<sup>1166</sup> Douglas MacDowell, *The Law in Classical Athens* (London: Thames and Hudson, 1978) 129, 199.

demonstrated below, the Athenian *asebeia* statute violated all eight requirements for dependable guideposts in substantive law.

First, the Athenian *asebeia* statute fails to state its terms in a manner that guarantees due process by failing to give fair warning of the prohibited conduct and the penalty for engaging in such conduct. Second, Athens did not adequately promulgate the *asebeia* statute. Its promulgation was fatally incomplete in that it failed to define the prohibited conduct and failed to state the penalty for such conduct.

Third, the *asebeia* statute violated the prohibition against retroactive application. The prohibited conduct and penalty were not determined until the trial, after the allegedly impious act was already committed. Fourth, the *asebeia* statute violated the requirement for expression in understandable terms by failing to provide the needed terms. The prohibited conduct, *asebeia*, is undefined, and no penalty for *asebeia* is stated.

Fifth, the *asebeia* statute fails the consistency requirement. Since most Athenian statutes were undefined, there was no means of determining their consistency with one another. Sixth, by failing to define the prohibited conduct, the *asebeia* statute renders compliance with its terms impossible.

Seventh, the *asebeia* statute fails the requirement for steadiness over time. The prohibited impious conduct and potential penalties change with each new *dikast* in each new case. Subjects are therefore unable to rely upon their provisions. Lastly, the *asebeia* statute is incapable of consistent application, since it contains no wording defining the prohibited conduct or the potential penalties.

## **D. Canon Law Violated the Principle of Reason**

### **1. Canon Law Did Not Respect its Subjects' Status as Rational Creatures with Free Wills**

Heresy prosecutions denied the status of their subjects as rational creatures with free wills. The essence of the heresy prosecution was the elimination of all freedom of opinion and belief on any subject addressed by the Church. The inquisitor's burden of proof in heresy prosecutions did not require evidence of any heretical act. Instead, the inquisitors only needed to form a subjective suspicion of a heretical tendency based on the secret thoughts and opinions of the accused.<sup>1167</sup>

### **2. Canon Law Lacked Procedural Due Process Protections**

Procedural due process protections seek to prevent the conviction of innocent parties. These protections function by balancing the state's ability to prosecute its subjects with the subjects' ability to defend themselves. The Church viewed the inquisitor as an impartial spiritual father whose efforts to reclaim souls must be unimpeded by legal safeguards.<sup>1168</sup> The Inquisition therefore designed its procedures to give every possible advantage to the inquisitors and every disadvantage to the targeted individual.<sup>1169</sup> The inquisitors did not even bear the burden of proving that the defendant had actually committed a heretical offense or performed any particular act. Instead, the prosecution sought to establish heretical *tendencies*.<sup>1170</sup>

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<sup>1167</sup> Henry Charles Lea, *The Inquisition of the Middle Ages: Its Organization and Operation* (New York: Citadel, 1954) 96.

<sup>1168</sup> Henry Charles Lea, *The Inquisition of the Middle Ages: Its Organization and Operation* (New York: Citadel, 1954) 101: "All the safeguards which human experience had shown to be necessary in judicial proceedings of the most trivial character were deliberately cast aside in these cases, where life and reputation and property through three generations were involved. Every doubtful point was decided 'in favor of the faith.'"

<sup>1169</sup> Henry Charles Lea, *The Inquisition of the Middle Ages: Its Organization and Operation* (New York: Citadel, 1954) 101.

<sup>1170</sup> Wade Rowland, *Galileo's Mistake: A New Look At the Epic Confrontation between Galileo and the Church* (New York: Arcade, 2003) 242.



No accused could escape the Holy Office if his inquisitors vehemently suspected heresy or otherwise desired his condemnation. As Sir John Fortescue observed in 1470, the inquisitorial procedure placed every man's life and liberty at the mercy of any enemy who could suborn two unknown witnesses to swear against the accused.<sup>1171</sup> The procedure employed against Galileo violated every guarantee of procedural due process contained in the United States Constitution.

There was no protection against unreasonable searches and seizures in the form of probable cause or sworn warrants. The Holy Office issued its citations and arrested suspected heretics in secret.<sup>1172</sup> There were no grand juries or indictments to protect against arbitrary prosecution, and there was no protection against double jeopardy.

Canon law provided the accused no protection against giving compelled testimony against himself. Instead, the Holy Office *always* compelled the accused to testify against himself. The first demand made upon the accused in his trial was an oath that he would obey all the demands of the Church, answer all questions asked of him, betray all heretics known to him, and perform any penance imposed upon him. Refusal to take this oath constituted an admission of contumacious heresy.<sup>1173</sup>

The express *goal* of all proceedings before the Holy Office was to obtain the confession of the accused by *any* necessary means. The confession was the center of the inquisitorial process, and "no effort was deemed too great, no means too repulsive, to secure it."<sup>1174</sup> Even

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<sup>1171</sup> Sir John Fortescue, "In Praise of the Laws of England," *On the Laws and Governance of England*, ed. Shelley Lockwood (Cambridge: Cambridge UP, 1997) 41.

<sup>1172</sup> Henry Charles Lea, *The Inquisition of the Middle Ages: Its Organization and Operation* (New York: Citadel, 1954) 102.

<sup>1173</sup> Henry Charles Lea, *The Inquisition of the Middle Ages: Its Organization and Operation* (New York: Citadel, 1954) 95.

<sup>1174</sup> Henry Charles Lea, *The Inquisition of the Middle Ages: Its Organization and Operation* (New York: Citadel, 1954) 96, 101, 106; Richard J. Blackwell, *Behind the Scenes at Galileo's Trial: Including the First English Translation of Melchior Inchofer's Tractatus syllepticus* (Notre Dame, IN: U of Notre Dame

though canon law expressly prohibited the use of coerced confessions in 1140,<sup>1175</sup> the Holy Office considered confessions, even if obtained by torture, to be the purest and most reliable evidence.<sup>1176</sup>

The inquisitors had discretion to torture the accused to extract his confession.<sup>1177</sup> In Galileo's case, the Pope expressly directed the Holy Office to conduct Galileo's interrogation under a formal threat of torture.<sup>1178</sup> This routine utilization of torture to obtain confessions was anomalous, as canon law since the twelfth century prohibited any use of torture by clerics as well as the coercion of confessions in ecclesiastical proceedings.<sup>1179</sup>

The express purpose of torture, as stated in Eliseo Masini's 1621 inquisition manual, was "to make up for the shortcomings of witnesses, when they cannot adduce a conclusive proof against the culprit."<sup>1180</sup> Although each accused was only subject to being tortured once, inquisitors sidestepped this limitation by characterizing subsequent torture sessions as continuations of the original session.<sup>1181</sup> If the accused confessed under torture but later

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P, 2006) 7; and Wade Rowland, *Galileo's Mistake: A New Look At the Epic Confrontation between Galileo and the Church* (New York: Arcade, 2003) 242.

<sup>1175</sup> Edward Peters, *Torture* (Philadelphia: U Penn Press, 1996) 52-53; Henry Charles Lea, *The Inquisition of the Middle Ages: Its Organization and Operation* (New York: Citadel, 1954) 118.

<sup>1176</sup> Wade Rowland, *Galileo's Mistake: A New Look At the Epic Confrontation between Galileo and the Church* (New York: Arcade, 2003) 243.

<sup>1177</sup> Eliseo Masini, *Sacro Arsenale Pvero Prattica Dell'ufficio Della Santa Inquisizione* (Genoa: Appresso Giuseppe Pavoni, 1621); Maurice Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U of Cal P, 1989) 14; Henry Charles Lea, *The Inquisition of the Middle Ages: Its Organization and Operation* (New York: Citadel, 1954) 117-18.

<sup>1178</sup> Maurice Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U of Cal P, 1989) 38, 287, 363 n. 85.

<sup>1179</sup> Edward Peters, *Torture* (Philadelphia: U Penn Press, 1996) 52-53.

<sup>1180</sup> Eliseo Masini, *Sacro Arsenale Pvero Prattica Dell'ufficio Della Santa Inquisizione* (Genoa: Appresso Giuseppe Pavoni, 1621) 120. *Accord*, Maurice Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U of Cal P, 1989) 363.

<sup>1181</sup> Wade Rowland, *Galileo's Mistake: A New Look At the Epic Confrontation between Galileo and the Church* (New York: Arcade, 2003) 243; Henry Charles Lea, *The Inquisition of the Middle Ages: Its Organization and Operation* (New York: Citadel, 1954) 123.

retracted the confession, the law presumed that the confession was true and that the retraction was perjury. The retraction proved that the accused was an impenitent heretic, and the inquisitors remanded the accused to the secular authorities for execution at the stake without further hearing.<sup>1182</sup>

The accused received no notice of the nature of the charges and the accusations against them. The third question asked of Galileo in his 1633 trial was whether he knew or *could guess* why the Holy Office had summoned him to Rome.<sup>1183</sup>

The accused heretic did not receive a fair trial. There was no presumption of innocence. Instead, the Holy Office presumed every suspect to be guilty.<sup>1184</sup> In cases of “vehement suspicion,” such as Galileo’s, there was not even a requirement of *any* evidence. By legal fiction, the “vehement suspicion” itself satisfied all evidentiary requirements.<sup>1185</sup>

The accused did not receive a jury or an impartial tribunal. The Holy Office prejudged the accused as guilty before arresting him. The prosecuting inquisitors served as the final judges in the cases they chose to prosecute.

The accused did not receive a speedy trial. Inquisitions before the Holy Office could be a protracted affair, and there were no time limits on duration of the proceedings.<sup>1186</sup> The accused heretic did not receive a public trial. The Holy Office cloaked every aspect of the trial in secrecy,

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<sup>1182</sup> Henry Charles Lea, *The Inquisition of the Middle Ages: Its Organization and Operation* (New York: Citadel, 1954) 124-25.

<sup>1183</sup> April 12, 1633, Deposition of Galileo published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 256-62, 256.

<sup>1184</sup> Wade Rowland, *Galileo’s Mistake: A New Look At the Epic Confrontation between Galileo and the Church* (New York: Arcade, 2003) 242-43. Henry Charles Lea, *The Inquisition of the Middle Ages: Its Organization and Operation* (New York: Citadel, 1954) 101, 103.

<sup>1185</sup> Henry Charles Lea, *The Inquisition of the Middle Ages: Its Organization and Operation* (New York: Citadel, 1954) 243.

<sup>1186</sup> Wade Rowland, *Galileo’s Mistake: A New Look at the Epic Confrontation between Galileo and the Church* (New York: Arcade, 2003) 242-43.

justifying the secret conduct of trials as necessary to prevent the further dissemination of heresy.<sup>1187</sup>

The Holy Office did not permit the accused to confront the witnesses against him or subpoena witnesses on his own behalf. The Holy Office concealed the evidence supporting those charges and the identity of the witnesses against him. This denied the accused any opportunity to challenge the evidence against him or cross-examine adverse witnesses.<sup>1188</sup>

The Holy Office denied the accused any right to counsel, and any person that defended an accused heretic exposed himself to similar charges of heresy.<sup>1189</sup> The Holy Office permitted no bail, imprisoning the accused for the entire duration of the trial, often under harsh conditions.<sup>1190</sup> Restricted diet reduced the body and weakened the will, rendering the prisoner less able to resist alternate threats of death and promises of mercy.<sup>1191</sup>

Lastly, the accused received no protection against cruel and unusual punishment. The accused faced torture to compel his confession, the possibility of death by burning, and the psychological burden of an eternity without hope.

#### **E. Soviet Law Violated the Principle of Reason**

A fundamental requirement of the principle of reason is that law shall not convict or punish innocent subjects. Soviet law violated this fundamental requirement by codifying the *de*

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<sup>1187</sup> Wade Rowland, *Galileo's Mistake: A New Look at the Epic Confrontation between Galileo and the Church* (New York: Arcade, 2003) 242-43; Henry Charles Lea, *The Inquisition of the Middle Ages: Its Organization and Operation* (New York: Citadel, 1954) 102.

<sup>1188</sup> Wade Rowland, *Galileo's Mistake: A New Look at the Epic Confrontation between Galileo and the Church* (New York: Arcade, 2003) 242-43.

<sup>1189</sup> Henry Charles Lea, *The Inquisition of the Middle Ages: Its Organization and Operation* (New York: Citadel, 1954) 231.

<sup>1190</sup> Richard J. Blackwell, *Behind the Scenes at Galileo's Trial: Including the First English Translation of Melchior Inchofer's Tractatus syllepticus* (Notre Dame, IN: U of Notre Dame P, 2006) 7; Henry Charles Lea, *The Inquisition of the Middle Ages: Its Organization and Operation* (New York: Citadel, 1954) 103, 116.

<sup>1191</sup> Henry Charles Lea, *The Inquisition of the Middle Ages: Its Organization and Operation* (New York: Citadel, 1954) 116-17.

*jure* punishment of innocent subjects who committed no crime. Soviet trial procedure violated every guarantee of procedural due process provided by the United States Constitution, and Soviet law did not comply with any of the eight requirements of substantive due process.

### **1. Soviet Law Punished the Innocent**

Following Aristotle's views on praise and blame, the Western tradition only assigns criminal blame if the defendant is guilty of *both* an *actus reus*, a wrongful act, and a *mens rea*, the voluntary intention to commit that act. Punishment is justified by the intentional decision of the defendant to commit the criminal act.

Contrary to this view, Soviet law required neither an *actus reus* nor a *mens rea* to impose criminal liability. Soviet theorists adopted their view of crime from the Italian positivist school of criminology, particularly the work of Enrico Ferri.<sup>1192</sup> The Italian positivist school considered criminal conduct the result of the actor's social and physical circumstances rather than the actor's willful choice.

Ferri defined crimes in terms of acts that “disturb the conditions of existence and shock the average morality of a given people at a given moment.” He viewed punishment as “protective measures” taken by society against such acts. Since criminals possessed almost no freedom of will,<sup>1193</sup> the rationale for punishing offenders should not be deterrence or rehabilitation. Instead, Ferri advocated the incapacitation of criminals by “protective measures” that minimized their danger to society.<sup>1194</sup>

Soviet legal theorists adopted much of Ferri's positivist criminology in both the

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<sup>1192</sup> Harold J. Berman, *Soviet Criminal Law and Procedure: The RSFSR Codes*, (Cambridge, Harvard UP, 1966) 30.

<sup>1193</sup> Enrico Ferri, *Criminal Sociology* (London: Unwin, 1895) 1-50.

<sup>1194</sup> Enrico Ferri, *Criminal Sociology* (London: Unwin, 1895) 143-284.

terminology and provisions of the 1926 Criminal Code.<sup>1195</sup> Soviet law adopted Ferri's repudiation of individual responsibility for criminal actions, and thus dispensed with *actus reus* and *mens rea* as requirements for criminal liability. The result was the *de jure* punishment of innocent subjects.

Article 7 of the 1926 Criminal Code, for example, authorized punishment of any person, even in the absence of any criminal act, if that person represented a threat of "social danger."<sup>1196</sup> Article 6 of the 1926 Criminal Code defined "social danger" as "any act or *inaction*, directed against the Soviet structure or violating good order, established by worker-peasant authority in the period of time transitional to the Communist structure." [Emphasis added]. *Inaction*-literally, the complete absence of any criminal act- was therefore sufficient to render one "socially dangerous" and subject to punishment.

Another provision of Soviet law permitting the *de jure* punishment of innocent subjects was Article 58 of the 1926 Criminal Code. Article 58 governed "counterrevolutionary" offenses and authorized authorities to assess punishment against *innocent* family members and *innocent* dependents of convicted criminals.<sup>1197</sup> Article 58-1c, for example, subjected the innocent relatives of military deserters to Siberian exile for five years, even if they had played no part in the desertion.<sup>1198</sup>

A third provision of Soviet law permitting the punishment of innocent subjects was the

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<sup>1195</sup> Harold J. Berman, *Soviet Criminal Law and Procedure: The RSFSR Codes*, (Cambridge, Harvard UP, 1966) 30.

<sup>1196</sup> Vladimir Gsovski, "Reform of Criminal Law in the Soviet Union," *Social Problems* 7 (4) (1960) 315-28, 320; Harold J. Berman, *Justice in the USSR: An Interpretation of Soviet Law* (Cambridge, Harvard UP, 1978) 25.

<sup>1197</sup> Vladimir Gsovski, "Reform of Criminal Law in the Soviet Union," *Social Problems* 7 (4) (1960) 315-28, 320-21.

<sup>1198</sup> Harold J. Berman, *Soviet Criminal Law and Procedure: The RSFSR Codes*, 2nd ed. (Cambridge, Harvard UP, 1972) 34.

doctrine of “crime by analogy”<sup>1199</sup> established under Article 16 of the 1926 Criminal Code. The doctrine of crime by analogy authorized punishment for actions or inactions that the law did *not* prohibit. It was sufficient for conviction that the act was *analogous* to a prohibited act:

If any socially dangerous act is not directly provided for by the present Code, the basis and limits of responsibility for it shall be determined by application of those articles of the Code which provide for crimes most similar to it in nature.<sup>1200</sup>

The Nazis later adopted the doctrine of crime by analogy in Germany.<sup>1201</sup>

## 2. Soviet Law Lacked Procedural Due Process Protections

Soviet law after the Revolution is remarkable for its abandonment of procedural due process protections. As explained in Chapter V, *supra*, a directive in November 1918 freed the judges of the *narodnye sudy* (“People’s Courts”) from observing any substantive laws, any formal rules of procedure, and any formal rules of evidence.<sup>1202</sup> The directive instructed judges to determine guilt, not based on evidence or law, but on their subjective impressions of the facts and the parties.<sup>1203</sup>

Criminal prosecutions under the 1926 Criminal Code lacked even basic due process protections. No warrant was required to authorize an arrest. Prosecutorial approval was sufficient, even if first obtained *after* the arrest.

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<sup>1199</sup> For a detailed treatment of this unique legal doctrine, including its development and rationale, see Jurij Starosolskyj, *The Principle of Analogy in Criminal Law: an Aspect of Soviet Legal Thinking* (New York: Research Program of the USSR, 1954).

<sup>1200</sup> Vladimir Gsovski, “Reform of Criminal Law in the Soviet Union,” *Social Problems* 7 (4) (1960) 315-28, 319; Harold J. Berman, *Justice in the USSR: An Interpretation of Soviet Law* (Cambridge, Harvard UP, 1978) 26.

<sup>1201</sup> Harold J. Berman, *Justice in the USSR: An Interpretation of Soviet Law* (Cambridge, Harvard UP, 1978) 36.

<sup>1202</sup> Richard Pipes, *The Russian Revolution* (New York: Knopf, 1990) 798. *Accord*, Vladimir Gsovski, “Reform of Criminal Law in the Soviet Union,” *Social Problems* 7 (4) (1960) 315-28, 316.

<sup>1203</sup> Richard Pipes, *The Russian Revolution* (New York: Knopf, 1990) 798; Yevgenia Albats and Catherine A. Fitzpatrick, *The State Within a State: The KGB and Its Hold on Russia - Past, Present, and Future* (New York: Farrar, 1994).

There was no writ of *habeas corpus*. The Criminal Code permitted authorities to hold a suspect on mere suspicion for 14 days without informing the suspect of the charges against him. In actual practice, however, there was *no limit* on the period that authorities could hold a suspect without adjudication. Investigators were wholly exempt from judicial supervision and were only accountable to the prosecutor or the secret police for their actions.<sup>1204</sup>

Authorities held prisoners incommunicado. Defendants had no right to counsel until the completion of all pre-trial investigations, procedures, and the drafting of the bill of charges.<sup>1205</sup> All pretrial proceedings excluded the defendants.<sup>1206</sup>

There was no presumption of innocence, and the burden of proving innocence, with the attached quandary of proving a negative, was on the accused.<sup>1207</sup> There was no protection from *ex post facto* laws, and authorities applied laws retroactively.<sup>1208</sup> Courts also had discretion under Article 14 of the 1926 Criminal Code to suspend the statute of limitations in cases involving “counterrevolutionary” offenses.<sup>1209</sup>

The State also enjoyed an unequal right of appeal over the defendant. The accused could only appeal up one level. Prosecutors, however, enjoyed unlimited appeals.

Defendants received no protection against double jeopardy. Prosecutors could move to reopen any case for any reason, including a claim that the punishment was too lenient. There

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<sup>1204</sup> Vladimir Gsovski, “Reform of Criminal Law in the Soviet Union,” *Social Problems* 7 (4) (1960) 315-28, 324-25.

<sup>1205</sup> Vladimir Gsovski, “Reform of Criminal Law in the Soviet Union,” *Social Problems* 7 (4) (1960) 315-28, 326. This provision remained unchanged after the 1958 reforms. *Id.*

<sup>1206</sup> Vladimir Gsovski, “Reform of Criminal Law in the Soviet Union,” *Social Problems* 7 (4) (1960) 315-28, 324-25.

<sup>1207</sup> Vladimir Gsovski, “Reform of Criminal Law in the Soviet Union,” *Social Problems* 7 (4) (1960) 315-28, 324.

<sup>1208</sup> Harold J. Berman, *Justice in the USSR: An Interpretation of Soviet Law* (Cambridge, Harvard UP, 1978) 26.

<sup>1209</sup> Harold J. Berman, *Justice in the USSR: An Interpretation of Soviet Law* (Cambridge, Harvard UP, 1978) 25.



was no time limit on the prosecution's reopening cases, and the prosecution could reopen the same case multiple times. The defendant did not receive notice that his case was under review, and the defendant had no right to appear regarding the reopening of a case.<sup>1210</sup>

State security agencies, including the Cheka, GPU, OGPU, NKVD, and MVD, had the power to convict and punish any defendant. These agencies could assume jurisdiction of any criminal case and dispose of the case without interference from any court. These agencies operated without *any* rules of criminal law or procedure.<sup>1211</sup>

In closing, the procedure in Soviet trials, particularly the three Moscow Trials, shared remarkable similarities with inquisition proceedings before the Congregation of the Holy Office. Both systems violated all nineteen of the procedural due process guarantees contained in the United States Constitution. Both systems made the confession of the accused the center of the entire trial process, and “no effort was deemed too great, no means too repulsive, to secure it.” Confessions obtained under torture and duress often constituted the entirety of the evidence in the trial.

### **3. Soviet Law Lacked Substantive Due Process**

Soviet law violated all eight requirements of substantive due process for dependable guidelines in law. The first principle is that authorities must express laws in general terms in a manner that guarantees due process. Criminal laws, for example, must give fair warning of the prohibited conduct and the penalty for engaging in such conduct.

Soviet law was remarkable in its failure to provide meaningful standards of conduct for its subjects. Lenin's November 22, 1917 decree, for example, instructed judges to enforce laws

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<sup>1210</sup> Vladimir Gsovski, “Reform of Criminal Law in the Soviet Union,” *Social Problems* 7 (4) (1960) 315-28, 326-27.

<sup>1211</sup> Vladimir Gsovski, “Reform of Criminal Law in the Soviet Union,” *Social Problems* 7 (4) (1960) 315-28, 317.

only to the degree that the laws “did not contradict the *revolutionary conscience* and the *revolutionary sense of legality*.”<sup>1212</sup> The November 22, 1917 decree also directed judges to issue verdicts according to the “*socialist sense of justice*.” The Commissariat of Justice instructed the Revolutionary Tribunals on December 21, 1917 to set criminal penalties according to the tapes of “*revolutionary conscience*.”<sup>1213</sup> All of these terms, “*revolutionary conscience*,” “*revolutionary sense of legality*,” and “*socialist sense of justice*” were undefined. Such terms provide no meaningful guidance to Russian subjects who faced summary execution for their violation.

A ruling in November 1918 prohibited judges of the *narodyne sudy* (“People’s Courts”) from applying any laws enacted before the revolution of October 1917.<sup>1214</sup> The ruling also instructed the judges to determine guilt, not based on evidence or law, but on their subjective impressions of the facts and the parties.<sup>1215</sup> Russian subjects were subject to criminal penalties, but the prohibited conduct and the penalty for engaging in such conduct was wholly undefined. There were no laws.

The eventual codification of Soviet law, such as the 1926 Criminal Code, offered little improvement. The definition of crime as “*socially dangerous*” action or inaction in Articles 6 and 7, the doctrine of “crime by analogy” in Article 16, and the authorized punishment of innocent parties under Article 58 fail the substantive due process requirement that laws give fair warning of the prohibited conduct and the penalty for engaging in such conduct.

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<sup>1212</sup> An English translation of this “Decree No. 1” appears in Samuel Kucherov, *The Organs of Soviet Administration of Justice: Their History and Operation* (Leiden: Brill, 1970) 23-25.

<sup>1213</sup> Richard Pipes, *The Russian Revolution* (New York: Knopf, 1990) 798.

<sup>1214</sup> Richard Pipes, *The Russian Revolution* (New York: Knopf, 1990) 797-98. Accord, Vladimir Gsovski, “Reform of Criminal Law in the Soviet Union,” *Social Problems* 7 (4) (1960) 315-28, 316.

<sup>1215</sup> Richard Pipes, *The Russian Revolution* (New York: Knopf, 1990) 798; Yevgenia Albats and Catherine A. Fitzpatrick, *The State Within a State: The KGB and Its Hold on Russia - Past, Present, and Future* (New York: Farrar, 1994).

Soviet law failed the second requirement that society must promulgate its laws publicly. The promulgation of Soviet law was fatally incomplete. Soviet law failed to define the prohibited conduct and failed to state the penalty for such conduct. Soviet law violated the third requirement prohibiting retroactive application of laws. The prohibited conduct and penalty were not determined until the trial, *after* the allegedly criminal act was completed.

Fourth, Soviet law failed the requirement that laws be expressed in understandable terms. Soviet law failed to define the prohibited conduct and fails to state the penalty for such conduct in any terms. Fifth, Soviet law failed the requirement that laws be consistent with one another. Since the prohibited conduct and penalties were undefined, there was no means of assuring consistency between the laws. Sixth, Soviet law failed the requirement that laws must not render compliance impossible by requiring conduct beyond the powers of the affected parties. By failing to define prohibited conduct, Soviet law rendered compliance with the statute impossible for its subjects.

Seventh, Russian law failed the requirement that laws must not be changed so frequently that the subjects cannot rely upon them. The prohibited conduct and potential penalties changed with each new case and each new tribunal. Lastly, Soviet law failed the requirement that authorities apply laws in a manner consistent with their wording. Since Soviet law provided no wording defining the prohibited conduct or the potential penalties, application consistent with the law's wording was impossible.

### **III. The Principle of Consent**

The second principle in the standard of legal validity is the principle of *consent*. The *principle of consent* provides that the legitimacy of law derives from the consent of those subject to its power. Common law custom, the doctrine of *stare decisis*, and legislation sanctioned by the subjects' legitimate representatives all evidence consent. Legal systems that satisfy the principle

of consent tend to adopt limitations on the powers of government in the form of legal rights of the subjects that laws may not transgress.<sup>1216</sup>

### **A. Athenian Law Violated the Principle of Consent**

Athenian law did not satisfy the principle of consent. Since Athens' laws were undefined, their terms were unknown. Athenian subjects could not consent to unknown terms.

The *asebeia* statute used in Socrates' trial provided as follows: "If anyone commits *asebeia*, let anyone who wishes submit a *graphe*."<sup>1217</sup> The *asebeia* statute gives no definition for *asebeia*,<sup>1218</sup> and it specifies no penalty for *asebeia*.<sup>1219</sup>

Even the heliastic oath taken by each dikast reflects the pervasiveness of undefined laws in the *heliaea*. "I will cast my vote in consonance with the laws and with the decrees passed by the Assembly and by the Council, but, *if there is no law*, in consonance with my sense of what is most just, without favor or enmity. I will vote only on the matters raised in the charge, and I will listen impartially to the accusers and defenders alike."<sup>1220</sup>

### **B. Canon Law Violated the Principle of Consent**

The legal system employed by the Congregation of the Holy Office in the Galileo Affair did not satisfy the principle of consent. The Holy Office did not derive its power and authority

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<sup>1216</sup> In England, for example, William and Mary were required to give their public assent to the Declaration of Right before assuming power. Thomas Macaulay, *The History of England from the Ascension of James II* (New York: Harper, 1849) 442. The Declaration of Right forbade twelve categories of arbitrary powers illegally exercised by James II and listed thirteen rights protecting English subjects from such arbitrary exercises of power. Carl Stephenson and Frederick George Marcham, "The Bill of Rights (1689)," *Sources of English Constitutional History* (New York: Harper & Row, 1937) 599-602. In the United States, the people refused to ratify the Constitution without an express, written guarantee of similar rights. The drafters then added the Bill of Rights as ten amendments of the Constitution in order to obtain ratification.

<sup>1217</sup> Douglas MacDowell, *The Law in Classical Athens* (London: Thames and Hudson, 1978) 129.

<sup>1218</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 12. Solon failed to state his laws in "simple and explicit terms."

<sup>1219</sup> Douglas MacDowell, *The Law in Classical Athens* (London: Thames and Hudson, 1978) 129, 199. Demosthenes preserves the law against hybris.

<sup>1220</sup> James A. Colaico, *Socrates against Athens: Philosophy on Trial* (New York: Routledge 2001) 125.

from the consent of its subjects, and Galileo never consented to the jurisdiction of the Church or its Congregations over his work or person. The power and authority exercised by the Holy Office, like all power and authority under canon law, derived from the Pope.<sup>1221</sup>

Pope Paul III established the Congregation of the Holy Office in 1542 for the purpose of defending and upholding Catholic faith and morals. The Holy Office assumed the suppression of heresies and heretics formerly handled by the Medieval Inquisition. The Holy Office thus became virtually synonymous with the Inquisition from 1542 onward.<sup>1222</sup>

The Congregation of the Holy Office applied canon law. Canon law does not derive its authority from the consent of its subjects. Instead, canon law recognizes eight contributing sources: (1) sacred scripture, (2) divine tradition, (3) laws made by the Apostles, (4) the teachings of the Church Fathers, (5) the decrees of the Pope, (6) ecumenical councils, (7) the Roman Congregations of Cardinals, such as the Congregation of the Index and the Congregation of the Holy Office, and (8) custom.<sup>1223</sup>

Although custom usually evidences consent, canon law holds that all eight sources of canon law listed above ultimately reduce to one source, the authority of the sovereign Pope. Scripture and divine tradition do not constitute canon law unless the Holy See promulgates their prescriptions. The laws made by the Apostles and the teachings of the Church Fathers only become canon law by the consent and authority of Peter and his successor Popes. Councils are not ecumenical unless approved by the Pope, and the Congregations of Cardinals only exercise

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<sup>1221</sup> P. Charles Augustine, *A Commentary on the New Code of Canon Law*, vol. 1 (St. Louis: Herder, 1918) 10, 19. Augustine explains that the Pope holds “supreme power” and “jurisdictional supremacy” over all canon law; *accord*, Sebastian Bach Smith, *Elements of Ecclesiastical Law*, 9th ed. (New York: Benziger, 1887) 11-12, explaining that all sources of canon law ultimately reduce to one source, the authority of the sovereign Pope.

<sup>1222</sup> Maurice Finocchiaro, “Introduction,” *The Galileo Affair: A Documentary History* (Berkeley: U of Cal P, 1989) 14.

<sup>1223</sup> Sebastian Bach Smith, *Elements of Ecclesiastical Law*, 9th ed. (New York: Benziger, 1887) 11-12.

powers and authority conferred upon them by the Pope. Lastly, custom does not obtain the force of law without the sanction of the Apostolic See.<sup>1224</sup>

### **C. Soviet Law Violated the Principle of Consent**

Soviet law did not satisfy the principle of consent. Lenin founded Soviet law on the *coercion* of its subjects, not their consent. Communism did not come to Russia through popular uprising or popular vote.<sup>1225</sup> A small minority imposed Communism on Russia through a coup d'état.<sup>1226</sup>

Lenin sought to establish a “power that is limited by nothing, by no laws, that is restrained by absolutely no rules, that rests directly on coercion.”<sup>1227</sup> Centralized and organized violence was necessary, according to Lenin, to “crush the exploiters” and to lead the masses in the work of organizing the socialist economy.<sup>1228</sup> Lenin insisted that “revolutionary violence” was even essential “against the faltering and unrestrained elements of the toiling masses themselves.”<sup>1229</sup> Lenin thus sought to convert Russian legal institutions into organs of systematic terror. In Lenin's words, “the courts shall not do away with terrorism; to promise such a thing would mean to cheat ourselves or other people.”<sup>1230</sup>

During the period of “War Communism” from 1918 to 1921, Lenin destroyed the existing Russian legal system, not by consent of the people, but through a series of fiats that first

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<sup>1224</sup> Sebastian Bach Smith, *Elements of Ecclesiastical Law*, 9th ed. (New York: Benziger, 1887) 12.

<sup>1225</sup> Richard Pipes, *Communism: A Brief History*, (London: Weidenfeld and Nicolson, 2001), 39; Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 4-5.

<sup>1226</sup> Richard Pipes, *Communism: A Brief History*, (London: Weidenfeld and Nicolson, 2001), 38.

<sup>1227</sup> V.I. Lenin, *Polnoe Sobranie Sochinenii (Complete Collected Works)*, 5th ed., vol. 41 (Moscow: Institut Marksizma-Leninizma, 1958-65) 383.

<sup>1228</sup> V.I. Lenin, *The State and Revolution* (Whitefish, MT: Kessinger, 2004) 22.

<sup>1229</sup> Leonard Schapiro, *The Communist Party of the Soviet Union* (London: Vintage, 1960) 207.

<sup>1230</sup> Vladimir Gsovski, “Reform of Criminal Law in the Soviet Union,” *Social Problems* 7 (4) (1960) 315-28, 316.

destroyed the legal profession, then the court system, and finally all laws that existed prior to the Revolution.<sup>1231</sup> Once Lenin destroyed these institutions, Lenin established Revolutionary Tribunals by unilateral decree. He “streamlined” their proceedings by removing all restrictions on their procedures and their judgments.<sup>1232</sup> When he deemed the terror inflicted by these tribunals to be insufficient, he increasingly came to rely on the Cheka, the *Chrezvychaynaya Komissiya* (“Extraordinary Commission”) or political police, which he endowed with an almost unrestricted license to kill.<sup>1233</sup>

During the period of the “New Economic Policy” from 1921-1928, Lenin instituted and guided the new codifications of Russian law, not by consent of the people, but by personal fiat.<sup>1234</sup> The new criminal codes continued the practices of the Red Terror and the Revolutionary Tribunals. N. V. Krylenko, later People's Commissar of Justice, wrote in his 1923 treatise on the Soviet judiciary that the court system functioned, not as a servant of the people, but as “an organ of government power.” “A club is a primitive weapon,” wrote Krylenko, “a rifle is a more efficient one, the most efficient is the court. For us there is no difference between a court of law and summary justice.”<sup>1235</sup>

Stalin's handling of the Kirov Affair in 1934 offers a final example of the lack of consent in Soviet law. After arranging Kirov's assassination, Stalin issued a unilateral decree on

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<sup>1231</sup> See discussion of the decrees of November 22, 1917, and December 21, 1917, in Chapter V, *supra*.

<sup>1232</sup> See discussion of Lenin's “streamlining” in March 1920 in Chapter V, *supra*.

<sup>1233</sup> Richard Pipes, *The Russian Revolution* (New York: Knopf, 1990) 800.

<sup>1234</sup> See discussion of the production in 1922 and 1923 of the Soviet Judiciary Act, Civil Code, Code of Civil Procedure, Criminal Code, Code of Criminal Procedure, Land Code, and Labor Code in Chapter V at pages 245-48, *supra*. The Soviet Government also enacted a new Criminal Code and a new Family Code in 1926. Harold J. Berman, *Justice in the USSR: An Interpretation of Soviet Law* (Cambridge, Harvard UP, 1978) 34.

<sup>1235</sup> G. M. Razi, “Legal Education and the Role of the Lawyer in the Soviet Union and the Countries of Eastern Europe,” *Cal. L. Rev.* 48 (5) (1960): 776-804, 792; Harold J. Berman, *Justice in the USSR: An Interpretation of Soviet Law* (Cambridge, Harvard UP, 1978) 36.

December 1, 1934, directing all investigative agencies “to speed up the cases of those accused of *the preparation* or execution of acts of terror.” Stalin ordered courts to execute death sentences “immediately after the passage of such sentences,” and he prohibited all appeals and pardons.<sup>1236</sup> This decree and the other “Kirov amendments” to the Criminal Code initiated by Stalin after Kirov's murder became the tools for accomplishing Stalin's “Great Terror,” including the Moscow Trials of 1936-1938.<sup>1237</sup>

#### **IV. The Principle of Autonomy**

The third principle governing legal validity is the principle of *autonomy*, which established the authority of law. Laws must wield superiority over political rulers. The ruler must be under the same laws as his subjects, and the laws must not be subject to arbitrary change to reflect the will of the political ruler. To paraphrase de Bracton, the law makes the king; the king does not make the law.<sup>1238</sup> To paraphrase Aristotle, rightly constituted laws must be the final sovereign.<sup>1239</sup>

##### **A. Athenian Law Violated the Principle of Autonomy**

The Athenian legal system violated the principle of autonomy in three significant aspects. The first was Solon's constitution of 594 B.C. that gave political rulers supremacy over law. The second was the failure of Athenian statutes to define the conduct they prohibited and the penalty for such conduct. The third was the ease by which political rulers could amend the law to reflect their will.

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<sup>1236</sup> Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 41.

<sup>1237</sup> According to Soviet archives, Stalin's “security organs” detained 1,548,366 persons during the height of the Great Terror in 1937 and 1938. Stalin's “security organs” shot 681,692 of these detainees. This averages more than 1,000 Russian subjects shot each day. Richard Pipes, *Communism: A Brief History*, (London: Weidenfeld and Nicolson, 2001) 67.

<sup>1238</sup> Henry de Bracton, *De Legibus et Consuetudinibus Angliae* (*On the Laws and Customs of England*), ed. George E. Woodbine, trans. Samuel E. Thorne, vol. 1 (Cambridge: Harvard UP, 1968) 33.

<sup>1239</sup> Aristotle, *The Politics of Aristotle*, trans. Ernest Barker (Oxford: Oxford UP, 1946) 127.



First, Solon's constitution violated the principle of autonomy by giving the political rulers supremacy over law. Solon gave the *dikasts* supremacy over law by empowering the *heliaea* to decide any disputes regarding their interpretation.<sup>1240</sup>

Second, Athenian statutes violated the principle of autonomy by failing to define the conduct they prohibited and the penalty for such conduct. Each *dikast* was required to define the prohibited conduct and the penalty anew in every case. This gave the *dikast*, as the political ruler, supremacy over law.

Third, Athenian law violated the principle of autonomy by permitting the political rulers to arbitrarily amend the law to reflect their will. A simple majority vote at one meeting of the *boule* and one meeting of the *ekklesia* was enough to abolish any existing law, however fundamental, or to make any new one, however drastic.<sup>1241</sup> Pericles' political enemies, for example, created a new law to facilitate the political prosecution of Anaxagoras to embarrass Pericles.<sup>1242</sup>

The Athenians eventually recognized the need for the principle of autonomy and the dangers of allowing political rulers to amend the laws to reflect their will. After Athens' fall in the Peloponnesian War, the Thirty Tyrants amended the laws in 404 B.C. to maintain their rule by terror. The new laws gave the Thirty Tyrants the power to execute any Athenian without trial. Once the Thirty Tyrants were deposed, Athens recodified her laws in 403 B.C. to make them more difficult to amend.<sup>1243</sup>

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<sup>1240</sup> Aristotle, *The Athenian Constitution*, trans. Sir Frederic G. Kenyon (Seaside, OR: Merchant, 2009) 12.

<sup>1241</sup> Douglas MacDowell, *The Law in Classical Athens* (London: Thames and Hudson, 1978) 48.

<sup>1242</sup> Plutarch, "Pericles," *Plutarch's Lives of Illustrious Men*, trans. John Dryden, vol. 3 (Philadelphia: Coates, 1900) 264. See discussion in the text at pages 166-169, *supra*.

<sup>1243</sup> Douglas MacDowell, *The Law in Classical Athens* (London: Thames and Hudson, 1978) 48. See discussion in text at pages 162-64, *supra*.

## **B. Canon Law Violated the Principle of Autonomy**

The canon law system utilized by the Congregation of the Holy Office violated the principle of autonomy in two aspects. First, canon law did not wield superiority over the political rulers of the Church, the Popes and the Congregation of the Holy Office. Second, the Popes and the Congregation of the Holy Office disregarded and evaded any provisions of canon law that interfered with their prosecution of heresy.

First, canon law violated the principle of autonomy by failing to wield supremacy over the political ruler of the Church. The Pope held “supreme power” and “jurisdictional supremacy” over all aspects of canon law.<sup>1244</sup>

Second, the political rulers of the Church evaded or ignored the provisions of canon law forbidding the use of coerced confessions, forbidding torture, and mandating secrecy in heresy prosecutions. The Holy Office routinely ignored two provisions forbidding the use of coerced confessions. Beginning in 1140, and continuing until 1918, canon law mandated that ecclesiastical proceedings could only accept spontaneous confessions. Canon law expressly prohibited the use of coerced confessions.<sup>1245</sup> Nevertheless, the Holy Office considered confessions, even if coerced by torture, to be the purest and most reliable evidence.<sup>1246</sup>

Canon law also forbade torture in 1140, continuing until 1918, but proceedings before the Inquisition began utilizing torture in its proceedings soon after the Fourth Lateran Council in

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<sup>1244</sup> P. Charles Augustine, *A Commentary on the New Code of Canon Law*, vol. 1 (St. Louis: Herder, 1918) 10, 19. Augustine explains that the Pope holds “supreme power” and “jurisdictional supremacy” over all canon law. Accord, Sebastian Bach Smith, *Elements of Ecclesiastical Law*, 9th ed. (New York: Benziger, 1887) 11-12.

<sup>1245</sup> Edward Peters, *Torture* (Philadelphia: U Penn Press, 1996) 52-53.

<sup>1246</sup> Wade Rowland, *Galileo's Mistake: A New Look At the Epic Confrontation between Galileo and the Church* (New York: Arcade, 2003) 243.

1215.<sup>1247</sup> The express goal of all proceedings before the Holy Office became the securing of a confession of heresy from the accused by any necessary means.<sup>1248</sup> In Galileo's case, the Pope expressly directed the Holy Office to conduct Galileo's interrogation under a formal threat of torture.<sup>1249</sup>

Another example of the ecclesiastical evasion of canon law in Galileo's case involved the secrecy provisions of proceedings before the Holy Office. The Congregation of the Holy Office cloaked every aspect of its heresy trials in secrecy,<sup>1250</sup> and members of the Holy Office faced severe punishment for speaking or writing about their cases.<sup>1251</sup> In Galileo's case, however, the Pope evaded the Holy Office's secrecy requirements for political reasons by appointing an unprecedented three member Special Commission to examine Galileo's *Dialogue on the Two*

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<sup>1247</sup> Edward Peters, *Torture* (Philadelphia: U Penn Press, 1996) 52-53. After the April 6, 1252, murder of the Papal inquisitor of Lombardy, Pope Innocent IV issued a papal bull entitled *Ad extirpanda* on May 15, 1252. This bull mandated that *civil authorities*, in exchange for one third of the heretic's property, conduct torture on accused heretics to extract confessions when called upon by the inquisitors. Henry Charles Lea, *The Inquisition of the Middle Ages: Its Organization and Operation* (New York: Citadel, 1954) 33-35. Canon law prohibited all ecclesiastics from taking part in these tortures, however. If they entered the torture chamber during the interrogation of the prisoner, their presence rendered them "irregular." They could not exercise their office until they obtained the necessary dispensation. Elphège Vacanard, *The Inquisition: A Critical and Historical Study of the Courses Power of the Church*, trans. Bertrand L. Conway (London: Longman's, 1908) 154. The Inquisitors complained that their absence during the interrogation hindered their efforts and prevented the proper interrogation of the accused. They lobbied to have the prohibition against clerics being present in the torture chamber removed. On April 27, 1260, Pope Alexander IV authorized inquisitors to grant each other mutual dispensations and absolve each other for any violations of these provisions of canon law. Elphège Vacanard, *The Inquisition: A Critical and Historical Study of the Courses Power of the Church*, trans. Bertrand L. Conway (London: Longman's, 1908) 154. Lea gives the date as 1256. Henry Charles Lea, *The Inquisition of the Middle Ages: Its Organization and Operation* (New York: Citadel, 1954) 118. Pope Urban IV renewed this permission on August 4, 1262. The Inquisitors received Urban's renewal as a practical authorization for the inquisitors to participate in the torture.

<sup>1248</sup> Henry Charles Lea, *The Inquisition of the Middle Ages: Its Organization and Operation* (New York: Citadel, 1954) 106.

<sup>1249</sup> Maurice Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U of Cal P, 1989) 38, 287, 363 n. 85.

<sup>1250</sup> Wade Rowland, *Galileo's Mistake: A New Look at the Epic Confrontation between Galileo and the Church* (New York: Arcade, 2003) 242-43; Henry Charles Lea, *The Inquisition of the Middle Ages: Its Organization and Operation* (New York: Citadel, 1954) 102.

<sup>1251</sup> Richard J. Blackwell, *Behind the Scenes at Galileo's Trial: Including the First English Translation of Melchior Inchofer's Tractatus syllepticus* (Notre Dame, IN: U of Notre Dame P, 2006) 7.

*Chief World Systems*. The Special Commission publicly recommended that the Pope refer Galileo's case to the Congregation of the Holy Office for prosecution.<sup>1252</sup>

### **C. Soviet Law Violated the Principle of Autonomy**

The Soviet legal system violated the principle of autonomy in three aspects. First, the political rulers, particularly Lenin, wielded supremacy over law by destroying and creating legal institutions at will. Second, the political rulers wielded supremacy over law by governing without law, without court procedures, and without rules of evidence. Third, the political rulers, particularly Lenin and Stalin, wielded supremacy over law by creating and amending new laws at will.

The first aspect of Soviet law's violation of autonomy was Lenin's destruction and creation of legal institutions at will during the early years of Bolshevik rule. On November 22, 1917, Lenin issued "Decree No. 1 on Courts,"<sup>1253</sup> a decree abolishing the professions associated with the judicial system, including the legal profession, the Procurator (the Russian equivalent of the Attorney General), and most justices of the peace.<sup>1254</sup> The 1917 decree also dissolved almost all the existing courts, including the Senate, the highest court of appeals.<sup>1255</sup> When the functioning courts refused to recognize the validity of the decree, Lenin used the Red Army to

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<sup>1252</sup> David Marshall Miller, "The Thirty Years' War and the Galileo Affair," *History of Science* 46 (1) (2008): 49-74, 62-63. See the September, 1632, Special Commission Report on the Dialogue, published in Maurice A. Finocchiaro, *The Galileo Affair: A Documentary History* (Berkeley: U Cal. P, 1989) 218-22.

<sup>1253</sup> Technically, the Council of People's Commissars issued "Decree No. 1 on Courts." Nevertheless, Lenin personally revised the decree, and Lenin personally supervised its passage. According to Piotr Ivanovich Stuchka, the first president of the Supreme Court of the Soviet Union and author of the first draft of the decree, Lenin secured its passage by the Council of People's Commissars rather than the Central Executive Committee where it would probably have met opposition from the Left Socialist Revolutionaries and the Internationalists. Piotr Ivanovich Stuchka, *Selected Writings on Soviet Law and Marxism*, ed. Robert Sharlet (New York: Sharpe, 1988) xiii. For a detailed discussion of the drafting and the contents of the decree, see Samuel Kucherov, *The Organs of Soviet Administration of Justice: Their History and Operation* (Leiden: Brill, 1970) 21-25.

<sup>1254</sup> Richard Pipes, *The Russian Revolution* (New York: Knopf, 1990) 797.

<sup>1255</sup> An English translation of this "Decree No. 1" appears in Samuel Kucherov, *The Organs of Soviet Administration of Justice: Their History and Operation* (Leiden: Brill, 1970) 23-25.

force them to cease operations.<sup>1256</sup>

Lenin's decree of November 22, 1917, also established a new type of court, the Revolutionary Tribunal.<sup>1257</sup> Modeled on a similar institution of the French Revolution, the Revolutionary Tribunal was responsible for prosecuting “counterrevolutionary crimes,” which included economic crimes and sabotage.<sup>1258</sup> In March 1918, Lenin replaced the *mestnye sudy* (“local courts”) with the *narodnye sudy* (“People's Courts”).

The second aspect of Soviet law's violation of autonomy was the rule by political rulers without law, without court procedures, and without rules of evidence. During the Red Terror, a November 1918 ruling prohibited judges of the *narodnye sudy* (“People's Courts”) from applying any laws enacted before the revolution of October 1917. The ruling also freed the judges of the *narodnye sudy* from observing any formal rules of procedure or evidence. The November 1918 ruling lastly instructed the judges to determine guilt, not based on evidence or law, but on their subjective impressions of the facts and the parties.<sup>1259</sup>

In March 1920, the government freed the “Revolutionary Tribunals” that Lenin created in his November 22, 1917 decree from all legal, procedural, and evidentiary restrictions except for stipulated minimum punishments.<sup>1260</sup> The Revolutionary Tribunals now possessed the discretion to deny the parties the right to call witnesses on their behalf, to question adverse witnesses, or even to appear to plead their case. They also had discretion to halt proceedings and

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<sup>1256</sup> Robert Conquest, *Justice and the Legal System in the USSR* (New York: Praeger, 1968) 12.

<sup>1257</sup> Harold J. Berman, *Justice in the USSR: An Interpretation of Soviet Law* (Cambridge, Harvard UP, 1978) 31.

<sup>1258</sup> Richard Pipes, *The Russian Revolution* (New York: Knopf, 1990) 798. Accord, Vladimir Gsovski, “Reform of Criminal Law in the Soviet Union,” *Social Problems* 7 (4) (1960) 315-28, 316.

<sup>1259</sup> Richard Pipes, *The Russian Revolution* (New York: Knopf, 1990) 798.

<sup>1260</sup> Robert Conquest, *Justice and the Legal System in the USSR* (New York: Praeger, 1968) 14.

render judgment at any time.<sup>1261</sup>

The NKVD “Special Board” provides another example of rule by political rulers without law, without court procedures, and without rules of evidence. At Stalin's direction, the Politburo created the NKVD “Special Board” on November 5, 1934.<sup>1262</sup> The Special Board possessed the authority to sentence Russian subjects to labor camps for being “socially dangerous” under Article 8 of the Corrective Labor Code.<sup>1263</sup> The Special Board was unrestricted in issuing convictions and ruled without any evidentiary requirements. Its proceedings involved no judicial officials, no judges, no attorneys, and no rules of procedure.<sup>1264</sup> Defendants had no right to appear or to present their defense, and the Special Board usually tried its cases *in absentia*.

The Special Board ignored restrictions on its sentences. Although the maximum authorized sentence was five years, the Special Board routinely issued sentences of 8 to 10 years and routinely resented its convicts at the end of their terms.<sup>1265</sup>

The third aspect of Soviet law's violation of autonomy was the arbitrary creation and amendment of new laws at the will of the political rulers. The Soviet Constitution granted

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<sup>1261</sup> Richard Pipes, *The Russian Revolution* (New York: Knopf, 1990) 800.

<sup>1262</sup> J. Arch Getty and Oleg V. Naumov, *The Road to Terror: Stalin and the Self-Destruction of the Bolsheviks, 1932-1939*, trans. Benjamin Sher (New Haven: Yale UP, 2010) 63.

<sup>1263</sup> “Article 8. Persons are directed to corrective labor who have been sentenced thereto by (a) sentence in a court of law; (b) decree of administrative organ.” Initially, the maximum sentence that the NKVD “Special Board” could issue was five years.

<sup>1264</sup> J. Arch Getty and Oleg V. Naumov, *The Road to Terror: Stalin and the Self-Destruction of the Bolsheviks, 1932-1939*, trans. Benjamin Sher (New Haven: Yale UP, 2010) 63. The NKVD “Special Board” consisted of the Deputy Head of the NKVD, the Plenipotentiary of the NKVD, the Head of The Main Administration of Militia, and the Head of the Union Republic NKVD where the case had arisen. A representative of the Prosecutor-General of the USSR could attend proceedings as an *ex officio* member. Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 284-85.

<sup>1265</sup> Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 284-85. The NKVD “Special Board” completed the resentencing formalities in Moscow and the local representative of the NKVD announced the new sentence to the accused in the labor camp.

supreme legislative authority to the Central Committee.<sup>1266</sup> At Lenin's direction, Soviet jurists created a new series of legal codes during the years of the New Economic Policy from 1921 to 1928. Soviet jurists formulated these new codes and the political rulers implemented them without the consent of their subjects.<sup>1267</sup>

The arbitrary creation and amendments of laws continued under Stalin. After arranging Kirov's assassination, Stalin issued a unilateral decree on December 1, 1934, directing all investigative agencies "to speed up the cases of those accused of *the preparation* or execution of acts of terror." Stalin ordered courts to execute death sentences "immediately after the passage of such sentences," and he prohibited all appeals and pardons.<sup>1268</sup> This decree became Stalin's charter for imposing the Great Terror.<sup>1269</sup>

## V. Conclusions

Valid legal systems treat their subjects as ends in themselves. The experiences of seventeenth century England, ancient Athens, the Congregation of the Holy Office, and Soviet Russia demonstrate that legal systems inherently tend to treat their subjects as means to ends.

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<sup>1266</sup> The 1918 Constitution of the Russian Soviet Federated Socialist Republic provided the following in article III, chapter 7, paragraph 31: "31. The All-Russian Central Executive Committee is the supreme legislative, executive and controlling organ of the Russian Socialist Federated Soviet Republic."

<sup>1267</sup> 1922 and 1923 saw the appearance of a new Judiciary Act, a new Civil Code, a new Code of Criminal Procedure, a new Criminal Code, a new Land Code, and a New Labor Code. The first Corrective Labor Code appeared in 1924, followed by a new Family Code and a revised Criminal Code in 1926. Robert Conquest, *Justice and the Legal System in the USSR* (New York: Praeger, 1968) 15.

<sup>1268</sup> Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 41.

<sup>1269</sup> The Politburo, at Stalin's behest, formalized the provisions of the decree nine days later by adding five new articles, Articles 466-470, to the Criminal Code of 1926. Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 41; Robert Conquest, *Stalin and the Kirov Murder* (New York: Oxford UP, 1989) 38. Article 466 mandated that investigators complete all investigations of alleged terrorism in no more than ten days. Article 467 required that defendants receive their indictment only one day before trial. Article 468 required that no lawyers could assist the defendants. Article 469 denied all appeals or requests for clemency, and Article 470 required that courts conduct executions immediately after sentencing. These "Kirov Amendments" to the Criminal Code became important tools in staging the Moscow Trials of 1936-1938.

Legal systems will not treat their subjects as ends in themselves unless forced to comply with the principles of reason, consent, and autonomy.

### **A. Two Consequences of Invalid Laws**

Two inevitable consequences result when a legal system fails to treat its subjects as ends in themselves. First, the legal system inevitably treats its subjects as means to the ends of the political rulers. The Stuarts treated their subjects as means to the ends of collecting illegal revenues and establishing the Stuart brand of religion. The democratic regime in Athens treated Socrates as the means to securing its existence against the threat of oligarchy. Urban VIII treated Galileo as the means to securing Urban's hold on the papacy. Stalin treated Trotsky as the means of consolidating Stalin's consolidation of power. Legal systems convicted Socrates, Galileo, and Trotsky even though each was innocent of the charges against him.

The second inevitable consequence of a legal system failing to treat its subjects as ends in themselves are the negative, and sometimes horrific, effects of these legal systems on their societies. Stuart absolutism precipitated a century of political and religious turmoil including brutal religious persecution, the two Bishop's Wars, three English civil wars, the execution of Charles I, the Protectorate, the Restoration, and ultimately the Glorious Revolution. Political prosecutions prevented ancient Athens from achieving political stability and led to her defeat in the Peloponnesian War. Heresy prosecutions helped precipitate the Protestant Reformation and plunge all of Europe into religious wars for decades. The Galileo Affair continues to tarnish the reputation and credibility of the Roman Catholic Church four centuries later.

### **B. The Soviet Legal Holocaust**

The Soviet legal system exhibited the most egregious violations of the principles of reason, consent, and autonomy, and the Soviet subjects suffered the most for it. Lenin unilaterally abolished the legal system to eliminate all legal restraints on power as the first step



in introducing mass terror.<sup>1270</sup> Isaac Steinberg, the Communist Commissar of Justice, objected to the execution of suspects without trial. “Why do we bother with a Commissariat of Justice?” asked Steinberg. “Let’s call it frankly the *Commissariat for Social Extermination* and be done with it!” “Well put,” replied Lenin, “that’s exactly what it should be. But we can’t say that.”<sup>1271</sup>

Lenin’s dismemberment of Russian legal institutions resulted in the complete collapse of the Soviet economy.<sup>1272</sup> The replacement laws put in place by Soviet leaders continued Lenin’s policy of mass terror through law.<sup>1273</sup> These laws provided the tools for accomplishing Stalin’s “Great Terror,” including the three Moscow Trials.<sup>1274</sup>

### 1. The “Great Terror”

The impact of these laws on Soviet subjects was staggering. Utilizing data released in 1987-1989 during Gorbachev’s *glasnost*, historian Robert Conquest estimates that Stalin’s agents arrested 8 million Russians during the Great Terror. Stalin’s agents executed an estimated 1.5 million of these. Approximately 2 million died in camps, 600,000 to 700,000 by execution.

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<sup>1270</sup> See discussion in text at pages 238-45, *supra*.

<sup>1271</sup> Isaac N. Steinberg, *In the Workshop of the Revolution* (London: Gollancz, 1955) 145.

<sup>1272</sup> The real value of Russian money in circulation on November 1, 1917, immediately before Lenin’s decree, was 1,919 billion rubles. On July 1, 1921, the value of Russian money in circulation dropped to 29 billion rubles, a decrease of 98.5%. Production and distribution in the Soviet economy were at a standstill and the nation was bankrupt. From January 1, 1917, to January 1, 1923, the quantity of money in Russia increased 200,000 times and the price of goods increased a staggering 100 million times. Overall, large-scale industrial production in 1920 fell 82% from its levels in 1913. Coal output dropped 73%, and iron production fell 97.6%. From 1918 to 1921, employment of industrial workers fell by more than half, and their standard of living fell to one-third of its prewar level. Richard Pipes, *The Russian Revolution* (New York: Knopf, 1990) 687-96. The Agrarian Marxist L.N. Kraitsman described the decline of the Soviet economy between 1917 and 1920 as a calamity “unparalleled in the history of mankind.” L. N. Kraitsman, *Geroicheskii period velikoi russkoi revoliutsii* (Moscow 1926) 166, quoted in Richard Pipes, *Communism: A Brief History* (London: Weidenfeld, 2001) 45.

<sup>1273</sup> See discussion in text at pages 245-46, *supra*.

<sup>1274</sup> See discussion in text at pages 246-54, 263-65, *supra*.

At the end of the Terror, approximately 1 million remained in prisons, and the camp population had increased from 5 million to 8 million.<sup>1275</sup>

## 2. “Dekulakization” and the “Terror-Famine”

These laws also permitted the imposition of policies designed to crush two segments of Soviet society that opposed the Stalinist regime. Stalin's policy of “dekulakization” from 1929 to 1933 targeted the “kulaks,” the economically better off peasants who represented the most influential and recalcitrant opponents to Stalin's policies.<sup>1276</sup> Dekulakization involved the liquidation or deportation to the Arctic of millions of peasants and their families as well as the confiscation of all their property. Stalin called “dekulakization” a second revolution, a “revolution from above.”<sup>1277</sup>

The second segment of Soviet society that opposed Stalin was the Ukraine and the largely Ukrainian Kuban region. Stalin's regime imposed forced collectivization by effectively abolishing private ownership of land and concentrating the remaining peasantry on “collective” farms under Party control. Ukrainian nationalist sentiment motivated many Ukrainians to oppose Stalin's policies. To crush this opposition, Stalin imposed the Holodomor or “terror-famine” on the region during 1932 and 1933.

Stalin created the famine by increasing grain quotas on the region to make them

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<sup>1275</sup> Robert Conquest, *The Great Terror: A Reassessment* (New York: Oxford UP, 1990) 484-86. According to Conquest, the Soviet government estimates that a total number of 40 million Russians died under Stalin's regime, not counting those who died during WW II. Approximately half died during the peasant terror of 1929 to 1933, and the other half from 1937 to 1953.

<sup>1276</sup> Robert Conquest, *The Harvest of Sorrow: Soviet Collectivization and the Terror-Famine* (New York: Oxford UP, 1986) 4. According to official records for 1930 and 1931, 1,803,392 persons had their belongings confiscated and were deported either to hard labor camps or, with their families, to Siberian exile. Richard Pipes, *Communism: A Brief History* (London: Weidenfeld, 2001) 58-59.

<sup>1277</sup> Commission of the Central Committee of the CPSU, *History of the Communist Party of the Soviet Union (Bolsheviks): Short Course* (New York: International, 1939) 306-06.

impossibly high.<sup>1278</sup> His regime then created a famine in the Ukraine by removing every handful of food and preventing any aid from reaching the Ukraine.<sup>1279</sup>

Together, the policies of “dekulakization” and the “terror-famine” resulted in an estimated 14.5 million deaths, roughly half from “dekulakization” and half from the “terror-famine.” Approximately 3.5 million victims of “dekulakization” died in hard labor camps.<sup>1280</sup> Exact numbers are unavailable. As Khrushchev observed in his memoirs, “no one was keeping count.”<sup>1281</sup>

### C. The Soviet View of Man

Every legal system reflects a view of man in the way it treats its subjects. The Soviet legalization of mass terror, like Lenin's regarding the Commissariat of Justice as a *Commissariat for Social Extermination*, reflected Soviet law's rejection of man's status as a rational creature with free will. Soviet law viewed man instead as the involuntary product of his economic conditions.

Soviet theorists regarded humanity as a stepping-stone to a “new man” and a “new society.” Marx wrote, “The present generation resembles the Jews who Moses led through the wilderness. It must not only conquer a New World, it *must also perish* in order to make room for the people who are fit for a New World.”<sup>1282</sup> Trotsky wrote rhapsodically of the communist

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<sup>1278</sup> Robert Conquest, *The Harvest of Sorrow: Soviet Collectivization and the Terror-Famine* (New York: Oxford UP, 1986) 220-24.

<sup>1279</sup> Robert Conquest, *The Harvest of Sorrow: Soviet Collectivization and the Terror-Famine* (New York: Oxford UP, 1986) 4, 97, 210-13, 217-24. Accord, Richard Pipes, *Communism: A Brief History* (London: Weidenfeld, 2001) 60.

<sup>1280</sup> Robert Conquest, *The Harvest of Sorrow: Soviet Collectivization and the Terror-Famine* (New York: Oxford UP, 1986) 299-307.

<sup>1281</sup> Nikita Khrushchev, *Khrushchev Remembers: The Last Testament*, trans. Strobe Talbott (London: Little, Brown, 1974) 120.

<sup>1282</sup> Karl Marx, *The Class Struggles in France: 1848-1850* (New York: International, 1964) 14 [emphasis added].

“superman” that the new society would produce. “Man will become immeasurably stronger, wiser, and subtler; the forms of life will become dynamically dramatic. The average human type will rise to the heights of an Aristotle, a Goethe, or a Marx. And above this ridge new peaks will rise.”<sup>1283</sup>

As Dewey observed, the vicious element in the socialist vision was that the end was so important that it justified the use of any means.<sup>1284</sup> In Soviet Russia, the absence of a viable standard of legal validity permitted the state to pursue its ends of the “new man” and the “new society” by securing the deaths of millions through legal processes. In fact, however, the means employed determined the horrific ends that the Soviets actually attained.

The sad chronicle of legal history, from ancient Athens to the Soviet Holocaust, demonstrates the necessity of a standard of validity based on the principles of reason, consent, and autonomy. In the absence of such a standard, laws will not treat their subjects as ends in themselves. They will inevitably treat their subjects as means to other ends. Once laws do this, men have no rest from evil.

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<sup>1283</sup> Leon Trotsky, *Literature and Revolution* (Chicago: Haymarket, 2005) 206-07.

<sup>1284</sup> John Dewey, “Significance of the Trotsky Inquiry,” *The Later Works of John Dewey*, ed. Jo Ann Boydston, vol. 11 (Carbondale, IL: S. Illinois UP, 2008) 332: “The vicious element in the whole conception is that the end is so important that it justifies the use of any means. This idea is so deeply ingrained in the Communists, that our own radicals resort to it and even excuse the present assassinations on that basis. In fact, however, it is the means that are employed that decide the ends or consequences that are actually attained.”

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